Supreme Court, U. S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1977

No. 77 1134

UNITED STATES OF AMERICA,

Appellee,

v.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W.A. GROFF, Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

An Appeal from the United States District Court for the District of Montana Helena Division

JURISDICTIONAL STATEMENT

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UNITED STATES OF AMERICA,

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Appellants.

JURISDICTIONAL STATEMENT

On Appeal from the United States District Court for the District of Montana, Helena Division

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Opinion Below

The judgment and opinion of the three judge Federal District Court for the District of Montana is reported at 437 Fed. Supp. 354 and are set forth in the separate Appendix, commencing respectively, at pages 1 and 5.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec.1253, this being an appeal from a final

declaratory judgment and decree of permanent injunction granted in a civil suit in which the United States was Plaintiff and which was heard and determined by a Federal District Court of three judges and in which the Montana Contractor's Gross Receipts Tax (Chapter 35, Title 84, Revised Codes of Montana) was declared unconstitutional and enforcement of the act was enjoined. Taxes collected under the Act since mid-1971 were ordered repaid. The action was commenced below by the United States pursuant to Title 28, Sections 1345, 2201, 2281 and 2284.

The judgment below was dated October 17, 1977, and was filed and entered on October 18, 1977, in the United States District Court for the District of Montana, Helena Division in Civil Action No. 1989. No order was made respecting any rehearing. Timely Notice of Appeal, dated December 15, 1977, was filed in the foregoing District Court on December 15, 1977, and a copy of the same is found in the Appendix, p. 36.

The statutory provisions believed to confer on this court jurisdiction of the appeal are Title 28 U.S.C. Secs.1253, 2281 and 2284.

Cases believed to sustain jurisdiction under the foregoing statutes are:

Philbrook -vs- Glodgett (Vt. 1975), 95 S. Ct. 1893, 421 U.S. 707, 44 L.Ed. (2d) 525

Chapman -vs- Meier (N.D. 1975) 95 S. Ct. 751, 420 U.S. 1, 42 L.Ed (2d) 766

Paul -vs- U.S. (Cal. 1963), 83 S. Ct. 426, 371 U.S. 245, 9 L. Ed(2d) 292

U.S. -vs- Georgia Public Service Commission (Ga. 1963), 83 S. Ct. 397, 371 U.S. 285, 9 L. Ed (2d) 317

The validity of a Montana state statute is involved in that the judgment below held that Chapter 35, Title 84 officially published in Vol. 5, Part 2 of Revised Codes of Montana, as amended, is in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2 and is, therefore, unconstitutional and void as to the United States of America, its contractors, subcontractors and those with whom it deals. The text of Chapter 35 is lengthy and is set forth verbatim in the Appendix commencing at page 38.

Nature of the Montana Act Which was Declared Unconstitutional

The Montana Act levies an initial 1% tax upon the gross receipts of "public contractors" defined to include all persons who perform contracts for the State of Montana, its subdivisions (e.g., counties, municipalities, school districts, special improvement districts etc.) and the United States Government. No gross receipts tax is levied under the Act upon "private contractors"—those who perform construction contracts for private citizens. The Act contains provisions for refunds and credits: public contractors who produce proof of payment of Montana personal property taxes receive dollar-for-dollar refunds of such taxes from the gross receipts taxes paid; the balance of the gross receipt tax may be claimed as a credit against Montana's personal income and corporate license taxes. By virtue of such credits the effective rate of the 1% gross receipts tax is reduced to approximately one half of one percent. The tax is levied on the contractor, not any governmental unit. The Federal government has nothing to do with collecting, withholding or remitting the tax.

Constitutionality of Montana Act was Twice Construed by the Montana Supreme Court During a Period When Federal Court Action in this case was Stayed for that Purpose

On April 2, 1971, Peter Kiewit Sons' Co. filed a suit in Lewis and Clark County, Montana challenging the constitutionality of the Act here in question. This state case is reported as *Kiewit Sons' -vs- St. Bd. of Equalization*, 161 Mont. 140, 505 P. (2d) 102 (1973), and can be conveniently referred to here as "Kiewit #1". It appears in the Appendix commencing page 105.

Also during the federal stay period, next described, the Montana Supreme Court decided *Kiewit #2*, 166 Mont. 260, 531 P. (2d) 1327, (1975), holding that *Kiewit* #1 was *res adjudicata* as to the constitutional challenges to the Act and additionally finding that the Act is a valid revenue raising measure.

On April 12, 1971, the United States filed a federal court complaint identical to the state court *Kiewit* #1 litigation in the Federal District Court of Montana, Cause No. 1989, Helena Division. A three judge Court was impaneled. On May 10, 1971, Montana filed its answer; and on May 24, 1971, the parties stipulated (App. 49) and the court made an order continuing the federal case without date "pending the resolution in the state courts or appeals therefrom of the (Kiewit) case." (App. 50.)

The United States controlled the state court litigation of *Kiewit*. It directed the filing of the case; paid the costs of litigation; was the real party in interest; directed the appeals to the Montana Supreme Court and to the United States Supreme Court. Notice of Appeal to the Supreme Court of the United States was filed in *Kiewit* #1 pursuant to 28 U.S.C. 1257 (2)

but was abandoned by Kiewit in August, 1973 at the direction of the U.S. Solicitor General, Erwin N. Griswold. (See Agreed Fact 12, App. 86)

After the state court litigation was concluded and the U.S. Supreme Court appeal was dismissed, Montana moved for Summary Judgment (App. 63) in the federal litigation under the rules of *England -vs-Medical Examiners*, 375 U.S. 411 and *Drummond -vs- U.S.*, 324 U.S. 316 on grounds that the United States controlled the state court litigation and had elected to fully litigate the case in the state courts and could not now return to the federal court to relitigate its claims. Also, the doctrines of res adjudicata and collateral estoppel were specified in support of such Motion. On November 8, 1974, the District Court denied the motion (App. 65-75), and the constitutional issues were again presented to the Federal Court resulting in the declaration of unconstitutionality and the injunction recited above.

QUESTIONS PRESENTED

1. Whether a one-half of one percent state gross receipts tax on contractors performing construction contracts for the State (and subdivisions) and Federal Governments violated the Supremacy Clause and the rule of *Phillips Chemical Co. -vs- Dumas School District*, 361 U.S. 376 (1960) because the revenue from the tax is a benefit to the State but not to the Federal Government.

2. Would not such an interpretation of the *Phillips* rule render any state tax on contractors or suppliers for both state and federal governments void and "overrule", sub-silentio, prior landmark decisions?[1].

[1] *James -vs- Dravo Contracting*, 320 U.S. 134, 82 L.Ed. 155, 58 S. Ct. 208 (1937)

3. Where the inherent nature of the Act requires classification of private citizens into taxpayers and non-taxpayers, did not the lower court err in eschewing any consideration of equal protection standards in testing for discrimination—electing instead to test solely under the Supremacy Clause?

4. Was it not error for the lower court to equate the Federal Government to the status of a taxpayer and test the classification of taxpayer and non-taxpayer under Supremacy standards; and would not such a Supremacy test invariably render state taxes void even when they clearly meet Equal Protection standards?

5. In this taxation field involving questions of "inter-governmental tax immunity" (*Phillips Chemical* at 361 U.S. 385) heavily involving present and future tax programs of the several states, should not the United States Supreme Court clearly define the scope of the requirement (*James -vs- Dravo*, Question 2, supra) that the state tax be "non-discriminatory"? Is the test for possible discrimination made under the Supremacy Clause (*Phillips Chemical* rule) or under the Equal Protection Clause of the Fourteenth Amendment (*Allied Stores -vs- Bowers*, 358 U.S. 522 (1959) *or both*? (See question as posed in *Homestake-Sapin Partners -vs- U.S.*, 375 F. (2d) 507, 512 (1967))

6. After electing the risks as specified in *England -vs- Louisiana Medical Examiners*, 375 U.S. 411, of

Silas Mason Co. -vs- Tax Comm. of Washington, 320 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937)

Alabama -vs- King & Boozer, 314 U.S. 1, 86 L. Ed. 3, 62 S. Ct. 43 (1941)

U.S. -vs- Detroit, 355 U.S. 466, 2 L. Ed. (2d) 424, 78 S. Ct. 474 (1958)

participating in and controlling state litigation which was conducted during stipulated abstention of federal litigation, can the Federal Government, when defeated at all state levels, return to the federal forum and relitigate the issues decided in the state court?

7. Are not the real parties in interest barred by the doctrines of res adjudicata and collateral estoppel from relitigating in the Federal Court issues resolved in state court litigation conducted during Federal Court abstention?

STATEMENT OF THE CASE

a) *Kiewit Decisions*

During the period of the Federal abstention, the Montana Supreme Court handed down opinions in both *Kiewit* #1 and #2 and decided:

a) There was a valid distinction for tax purposes between public contractors and private contractors, and the Act was not unconstitutionally discriminatory when gauged by Fourteenth Amendment, Equal Protection standards.

b) The Act did not unconstitutionally discriminate against the Federal Government under the Supremacy Clause (Art. VI, clause 2, U.S. Constitution) because those contractors who dealt with the State were treated no better than contractors dealing with the Federal Government as required by the *Phillips Chemical* rule.

c) The economic impact of the tax on the Government was not direct nor substantial and since it also was not discriminatory under either Equal Protection rules or Supremacy

rules, it met all requirements of *James -vs- Dravo*, 302 U.S. 134.

Kiewit #2 added the ruling that the Act was a valid revenue producing measure.

In November, 1974, after both *Kiewit* decisions the Federal Court denied Montana's motions for Summary Judgment, (App. 65). Thereafter the case was delayed getting on to trial because the Government desired to conduct an elaborate survey of the impact on in-state contractors -vs- out-of-state contractors of the Act's personal property and income tax credits. The Government hoped to show some discrimination against out-of-state contractors as suggested by the lower court in denying the State's motion for Summary Judgment (App.73) and thereby broaden its challenges to the Act beyond what the State courts had decided and so avoid the impact of the *England* and collateral estoppel rules. However, the survey showed that in-state contractors pay an effective tax after credits and refunds of .44% and out-of-state contractors working in the state pay .46%. In its final judgment the lower Court found the difference "de minimis" and the Government's contention of discrimination against out-of-state contractors to be without merit. (App. 17).

Immediately prior to trial in the federal court the Government agreed, after some four years of litigation, that the case of *Miller v. Arkansas*, 352 U.S. 187 was applicable and the regulatory provisions of the Act *do not apply* to the United States. (App. 78). A pre-trial order was prepared by the parties and approved by the trial judge. (App. 80-104).

b) *Federal Trial*

The case went to trial commencing March 30, 1976 before one of the three-judge panel—Hon. Russell E.

Smith. The Government's contentions were: (App. 92)

1. That the Act discriminates against the United States in violation of the Supremacy Clause in that:
   a) The Federal Government bears the entire burden of the tax.
   b) The Act forces the U.S. to pay more for its construction than does the State of Montana.
   c) The Act forces the Federal Government to pay more for its construction than does a private party.
2. The "legal incidence" of the tax falls on the United States. (rejected below)
3. The Act discriminates against out-of-state contractors. (rejected below)

The State's contentions were: (App. 94)

1. The Act treats federal contractors exactly the same as it treats state contractors and thereby complies with the *Phillips Chemical* rule (361 U.S. 376) and does not violate the Supremacy Clause.
2. There is a valid distinction for tax purposes between public contractors as a class and the class of contractors who perform work for private individuals; and hence, there is no discrimination under the Equal Protection Clause of the 14th Amendment.
3. No tax is laid directly on the U.S.; and the economic impact of the one half of one percent tax on the Government is neither direct nor substantial and therefore complies with the rule of *James -vs- Dravo*. (302 U.S. 134)
4. As the real party in interest in control of the

state court litigation, the Federal Government is barred by the doctrines of *England -vs- Medical Examiners*, 375 U.S. 411 and *Drummond -vs- U.S.*, 324 U.S. 316 from returning to the Federal forum and relitigating the case.

5. The Government's contentions that the Act discriminates against the U.S. by violating the Supremacy Clause and/or the Equal Protection Clause were each specifically passed upon by the Montana Supreme Court thereby barring re-litigation of such issues under the doctrine of collateral estoppel.

c) *Lower Court's Majority Decision*
(App. 5-19)

The majority of the lower court held:

1. There was Supremacy Clause discrimination against the Government because the revenues generated from the Act must be subtracted from the cost of otherwise matching, hypothetical State and Federal projects. Since the revenues of the State Act went to the State and not to the Federal Government, the State is treating itself better than the Government thereby violating the Supremacy Clause. (App. 11-13) (The lower court recognized (App. 12 para. 5) but held insignificant the fact that even under its foregoing comparison of costs at the sovereign level (rather than comparison of taxes at the contractor's level), all State subdivisions (cities, counties etc.) were treated exactly the same as the Federal Government since the tax went to the State and not to municipalities, school districts, SID's etc.)
2. While saying that it need not reach the question

of discrimination under the Equal Protection Clause, between the classes of contractors taxed and not taxed, the majority nevertheless found under unspecified standards that there was no distinction between public and private contractors and hence there was unlawful discrimination against Government contractors because of the tax on them. (App. 15-17)
3. Neither the *England* nor collateral estoppel doctrines were applicable. (App. 12-13)
4. In-state and out-of-state contractors are treated substantially identically and hence no constitutional violation at that level. (App. 17-18)

d) *Dissent Of Chief Circuit Judge Kilkenny*
(App. 20-35)

Judge Kilkenny vigorously dissented and noted:

1. Because of the Government's control of the state court litigation, it was bound by the state court results and could not return to the Federal forum and re-litigate. (*England rule*) (App. 25-26)
2. Collateral estoppel applies and forecloses reconsideration of the key supremacy and equal protection issues. (App. 23-27)
3. If the majority's Supremacy Clause requirement to deduct the tax from the cost of State construction were valid it would outlaw or "overrule", sub-silentio, the line of cases represented by *Dravo*. (App. 28) The proper test for Supremacy discrimination is at the level of the contractors who work either for the U.S. or for a division of State Government; and since the Act "treats

those who deal with the (federal) Government as well as it treats those with whom it deals", there is no Supremacy Clause violation. (App. 30-31)

4. The Act doesn't violate Equal Protection standards. The classification between public and private contractors is valid. (App. 31-33)
5. The legal incidence of the tax is not on the Federal Government. (App. 34)

- - - - -

QUESTIONS PRESENTED ARE SUBSTANTIAL

a) *The Lower Court Majority Misinterpreted and Misapplied the Phillips Chemical case.* [*Questions 1,2*]

The implications of the lower court's decision on the several States in the field of inter-sovereign taxation are cataclysmic; and as of the time of composition of this Jurisdictional Statement, some two dozen States already have indicated a desire to participate in the appeal as amici curiae.

The law in this area where sovereigns compete for valid taxation sources must be clear. The Attorneys General of the several states must know what state taxes can lawfully be enacted and what would transgress the Supremacy Clause. Both sovereigns must exist and perform their respective duties to their citizens.

> "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of similar power to the government of the Union; that it is to be concurrently exercised by the two governments are truths which have never been denied."
>
> *M'Culloch -vs- Maryland*, 4 Wheat. 415, 432

> "The States are, and they must ever be, coexistent with the national government. Neither can destroy the other. Hence, the federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States or prevent their efficient exercise."
>
> Holmes Dissent in *Panhandle Oil Co. -vs- Mississippi*, 227 U.S. 218,72 L. ED. 857, 48 S. Ct. 451 (1928)

Montana has never claimed that it had any power to levy a tax on the United States or in anywise license federal functions in the State of Montana. And under the plain reading of the *Dravo* and *King & Boozer* and *Phillips Chemical* cases, any state (prior to the lower holding here) could levy a 2% or less tax on contractors or suppliers of the Federal Government and since such a tax was neither directly on the Government nor the economic impact on it substantial, it was not unconstitutional if it was non-discriminatory. "Non-discrimination" in tax parlance had historically meant constitutional classification under Equal Protection rules (post 16); however, in the *Phillips Chemical* case it was further clarified to also mean that the state tax must be levied identically on contractors or suppliers of the State Government. This the Montana Act clearly did!

But the lower court majority misreads and misapplies the *Phillips Chemical* holding. Assuming hypothetically-matching state and federal projects, the lower court majority finds cost discrimination against the Federal Government because the tax itself can, be deducted from the cost of the state

project. Since the tax is a state tax, it goes to the State and not the federal coffers thereby, per the majority, creating an unconstitutional imbalance equal to the net of the tax. Such imbalance, per the majority below equals clear proof of "discrimination" under the Supremacy Clause;

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G.R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G.R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G.R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G.R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G.R. Tax and gets no return of the overplus of approximately 50 percent." (App. 13)

But, as the dissent indicates, such a holding overrules the long line of cases represented by *Dravo, King & Boozer.* (and others cited below).

> "The reasoning of the majority *sub silentio* overrules this and other authority. In each of the above cases, the tax would apply equally to those doing work for the state government. Applying the reasoning of the majority, there is discrimination against the federal government because the otherwise legitimately-collected tax (general state revenue) reduces the state's net cost, thereby allowing it to spend less than the federal government. Thus, under the guise of

> discrimination against the federal government, ANY STATE TAX could be traced backwards to defeat its own existence." (Emphasis supplied) (App. 28-29)

In each of the following intergovernmental tax cases revenues from a state tax went to the state and not the federal government thereby "discriminating" against the Government if it is proper to compare hypothetical state and federal projects and deduct the tax from the cost of the former.

James -vs-Dravo Contracting Co., 302 U.S. 134, 82 L. Ed. 155, 58 S. Ct. 208 (1937)

> 2% gross tax on contractors—including those working for federal government.

Alabama -vs- King & Boozer, 314 U.S. 1, 86 L. Ed 3, 62 S. Ct. 43 (1941)

> 2% sales tax on contractor with a cost-plus contract for federal government.

Silas Mason Co. -vs- Tax Comm. of Washington, 302 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937)

> 2% tax on gross income of contractors building Grand Coulee Dam for Government.

United States -vs- Boyd, 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. (2d) 713 (1964)

> State use tax on property owned by the federal government but used by independent contractors in their performance of federal contracts.

United States -vs- County of Fresno, ____U.S.____, 50 L.Ed. (2d) 683, 97 S. Ct.____(1977)

> Property tax on housing owned by Federal Government and used by forest service employees.

United States -vs- Detroit, 355 U.S. 466, 2 L. Ed. (2d) 424, 78 S. Ct. 474 (1957)

> State tax on U.S. property leased to private party.

Phillips Chemical did not require any such test for Supremacy Clause discrimination such as the lower court majority made. Nor does the lower majority cite any case that does. *Phillips Chemical* simply requires that the tax treat those who deal with the Federal Government at least as well as it treats those who deal with the State.

> "Accordingly, it does not seem too much to require that the State treat THOSE WHO DEAL WITH THE (federal) GOVERNMENT AS WELL AS IT TREATS THOSE WITH WHOM IT DEALS ITSELF." (Emphasis supplied) 4 L. Ed. (2d) 391

Conclusion on Lower Majority's Misapplication of the *Phillips Chemical* Rule

The lower majority misconstrued the *Phillips Chemical* rule thereby creating havoc among the states as to the true test for Supremacy Clause "discrimination". The Supreme Court should note probable jurisdiction.

b) *The Lower Court Erroneously Refused For Any Purpose to Review the Tax Classification Under Equal Protection Standards.* [*Questions 3, 4, 5*]

The decision in *Phillips Chemical* clarified for the states what was meant by Supremacy Clause "discrimination" in inter-sovereign taxation cases. Prior to *Phillips*, the line of cases represented by *James -vs- Dravo* had approved a state tax on contractors and suppliers of the Federal Government which was not direct, not substantial and was "non-discriminatory". Until the *Phillips* decision there was some confusion in the states as to what "discrimination" meant since in tax parlance "discrimination" is a portion of the legal subject

matter denominated "classification and discrimination" (71 Am. Jur. (2d) 491, Sec. 170 et seq., "State and Local Taxation") and is gauged as to constitutionality under long-established Equal Protection rules.

> *Allied Stores of Ohio -vs- Bowers*, 358 U.S. 522, 3 L. Ed. (2d) 480, 79 S. Ct. 437 (1959)
>
> *Brown Forman Co. -vs- Kentucky*, 217 U.S. 563, 54 L.Ed. 883, 30 S. Ct. 578 (1910)

Under such Equal Protection rules, the legislatures are given great discretion in tax classification which will be upheld if there is any "conceivable basis" supporting it.

> *Madden -vs- Kentucky*, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1939)

Prior to *Phillips Chemical* there may have been some temptation for the states in the inter-sovereign tax field to test for "discrimination" (as required by *James -vs- Dravo*) under Equal Protection, 14th Amendment rules only, as required in any tax case, but ignore supremacy connotations or at least gauge Supremacy issues by Equal Protection rules. This is what the Texas School District sought to do in the *Phillips Chemical Co.* case. There a tax was imposed on lessees of Federal property but not on lessees of State owned property. The school district sought to justify the difference under Equal Protection rules:

> "The imposition of a heavier tax burden on lessees of federal property than is imposed on lessees of other exempt (state) public property must be justified by significant differences between the two classes. The School District addresses this problem, essentially as one of

equal protection and argues that we must uphold the classification, though apparently discriminatory 'if any state of facts reasonably can be conceived that would sustain it.'"(parenthetical insert supplied) (citing *Allied Stores*)

361 U.S. 383

The Supreme Court rejected the School District's argument. It reaffirmed the vitality of the *Allied Stores* rules pertinent to Equal Protection issues but also laid down Supremacy Rules as to "discrimination" which require that a State treat those who deal with the Federal Government as well as it treats those who deal with itself.

Since the decision in *Phillips Chemical* but prior to the lower majority decision here, the rule in inter-sovereign tax cases seemed clear enough: A tax must pass two separate "discrimination" tests. As with any tax the classification between those who actually pay the tax and those who are excluded must be non-discriminatory under equal protection standards. And where a tax also has some inter-sovereign overtones, the tax must also be non-discriminatory in that it treats those taxpayers who deal with the Federal Government as well as it treats those who deal with the State.

The Supreme Court of Montana in *Kiewit* #1 recognized the necessity of the two tests and the differing rules as to each:

> "Appellant's principal argument is that a tax which is placed solely on public contractors is *discriminatory*. It maintains the only difference between public contractors and private contractors is the status of the party for whom the contractor is working. Such a difference, in

> appellant's view is not sufficient to justify the imposition of the tax." (emphasis supplied)
>
> "Our question now is—is it reasonable to make a classification for tax purposes for contractors doing public work and not for contractors doing private work?"

Then, after discussing long standing, *equal protection* rules—e.g., *Brown-Forman Co. -vs- Kentucky*, 217 U.S. 563, the Court concluded:

> "We believe that a distinction between public and private contractors is not arbitrary or capricious and following the reasoning of the United States Supreme Court—the state of Montana has power to make such a distinction and the statute in question is not unconstitutional."
>
> (App. 119)

Then, the Montana Court went on further and noted:

> "The second half of the *discrimination* question raised by appellant is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private nongovernmental parties. Appellant contends granting a preferred tax status to a substantial number of tax-payers, contractors performing work for private owners, and failing to grant a comparable status to construction contractors of the United States, constitutes unconstitutional discrimination against the United States and those with whom it deals.

"In response to this argument, respondent Board contends, basically, that since the state of Montana is treated in tax matters with public contractors the same as the federal government is treated, there is no discrimination. (citing *Phillips Chemical*)

- - - - -

"Here, we do not believe that the state of Montana has discriminated against the federal government. The federal government is being treated in the same manner as the state of Montana treats itself and its subdivisions or municipalities. The only discrimination the federal government can claim is that private contractors are not paying the same tax as public contractors. However, according to case law, all the United States Supreme Court has required is that the state does not give itself special treatment over that received by the federal government. The Act involved here treats the federal government in the same manner as it treats those who deal with any part of the state government. The second half of the discrimination question is denied." (App. 120, 121)

- - - - -

The lower court majority has now greatly confused the law and applicable rules in this area of great state concern by holding that a Supremacy test must be made not only of the relationship created by the taxing act between the two sovereigns but also that a Supremacy test (rather than an Equal Protection test) is also made of the actual classification for tax purposes between those taxed and those exempt.

> "We conclude and declare that the imposition of the G.R. Tax upon (public) Contractors discriminates against the Government in favor of private contractors, all in violation of the Supremacy Clause." (parenthetical insert added) (App.17)

Since the time of the *Phillips Chemical* decision the states have recognized that the Supremacy Clause has required that states must treat those who deal with the Federal Government as well as they treat those who deal with the state, but they didn't believe that the tax classification itself between those private citizens who had to pay the tax and those private citizens who didn't have to pay it was to be also gauged or judged by Supremacy standards. Such classification only had to pass Equal Protection muster.

Of course there was not and cannot be any direct tax on the United States; but taxes can have economic impact on non-taxpayers—particularly in sales taxes and cost-plus construction contracts. (*Alabama -vs- King & Boozer*, 314 *U.S.* 1) Under the lower court holding, a state tax which passes the proper *Phillips Chemical* Supremacy Clause test in that it equally treats the taxpayers who deal with the Federal and State Governments, respectively, and which has also classified the true taxpayers properly under Equal Protection rules, becomes unconstitutional under the Supremacy Clause if economic impact of the tax falls on the United States (*and also* on the State in question) but not on some class of private citizens who are not taxed.

The lower court interpretes the holding of *Phillips Chemical* as negating any role of Equal Protection guidelines for determining the constitutionality of classification between citizen taxpayers and citizen

non-taxpayers. The Supremacy Clause would take the place of the Equal Protection Clause and play the total and dual role of not only insuring that the State treated those who deal with it no better than those who deal with the Government but also to determine the validity of the tax classification of private citizens between those taxed and non-taxed. Thus, in addition to holding the Act unconstitutional under the Supremacy Clause as favoring the State of Montana over the Government, the lower court majority again applied the Supremacy rule and held the Act unconstitutional as favoring a class of private citizens who weren't taxed over a class of private citizens who were taxed and did so without gauging the constitutionality of the tax classification under Equal Protection standards.

> "In view of our holding that the Act violates the Supremacy Clause, we find it *unnecessary* to pass upon the Equal Protection Clause issues or upon the questions of collateral estoppel arising as to them.
>
> However, nothing in the issues raised presented, nor did the contractor Kiewit have standing to raise on behalf of the Government in *Kiewit*, the Government's current issue of the discriminatory effect upon it as an owner-building by the imposition of the G.R. Tax upon its contractors in violation of the Supremacy Clause. (citation)
>
> We conclude and declare that the imposition of the G.R. Tax upon Contractors discriminates against the Government in favor of private contractors, all in violation *of the Supremacy Clause.*" (emphasis supplied) (App. 15)

Such reasoning tests classification for tax purposes by Supremacy standards. *No State tax* could withstand such a test because in every tax there is one class who is taxed and another which is exempt. These classes of taxpayers are composed of citizens, not sovereigns, and the classification must stand up under constitutional standards formulated under the Equal Protection Clause. But if a sovereign Government is equated via the economic impact route to the position of a taxpaying citizen and the classification between those taxed and those not taxed is then gauged by Supremacy rules, *the tax will inevitably fall* even though there is a valid classification between the taxpayers under Equal Protection standards *and also* the State is found to be treating the Government as well as itself in compliance with the *Phillips Chemical* Supremacy test!

The lower court cites *United States -vs- County of Fresno*, 50 L. Ed. (2d) 683 (1977) as authority for the foregoing use of the Supremacy Clause to measure tax classification. But *Fresno* upheld a tax on private citizens' (U.S. Forest Service employees) occupation of government-owned residences. The Supreme Court found no Supremacy Clause discrimination because the tax was not only laid on federal employees occupying government residence but also on others *similarly situated:*

> "The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally *on the other similarly situated constituents of the State.*" (emphasis supplied)
>
> 50 L. Ed (2d) 692

The phrase "similarly situated" is a taxation phrase of art connoting classification for tax purposes under Equal Protection standards. The determination of the classification question of who are "similarly situated" and who are not is itself an Equal Protection function.

> *Walters -vs- St. Louis*, 347 U.S. 231, 98 L. Ed. 660, 74 S. Ct. 505 (1953)
> *Oliver Iron Mining Co. -vs- Lord*, 262 U.S. 172, 67 L. Ed. 929, 43 S. Ct. 526 (1923)

Here the tax was uniform on all taxpayers similarly situated—i.e., contractors having construction contracts for *any* public entity be it state, county, municipality, school district, Federal Government or its various subdivisions etc. If the classification was proper under Equal Protection standards as found by the Montana Supreme Court and the dissenting lower court judge here, then the rule of *Fresno* was satisfied and the economic impact of the tax on the United States fell equally on the "other similarly situated constituents of the state"—i.e., all owners of public property under construction.

Judge Kilkenny's dissent clearly recognized the error of the majority:

> "For equal protection purposes, there is a very liberal standard of review and cases will be upheld if there is any conceivable basis which will support the classification (citing *Allied Stores, Brown-Forman*). Essentially the same test is applied in cases related to intergovernmental tax immunity under the Supremacy Clause. Chief Justice Warren in the *Phillips* case, however,

> indicated that the equal protection cases are not controlling, and that the (federal) government's interest must be weighed in the balance to ascertain whether the state treats similarly-situated constituents in a similar fashion. 361 U.S. at 385. As noted above, this condition is satisfied here in that all contractors are subject to the same exact tax. In short, I think that the federal government has failed in its burden of showing the classification improper. In view of the standard of review, I would uphold the classification." (App. 33)

Conclusion on Court's Use of Supremacy Clause to Determine Classification Questions

The impact on the States of the erroneous ruling of the majority parallels its misapplication of the *Phillips* rule. Thus, *any state tax* which has economic impact on the Government because it is laid on certain citizens who contract with it or supply materials to it but is not on another class of citizens who have been classed as lying without the tax class becomes unconstitutional under the Supremacy Clause even though a valid classification exists for tax purposes under Equal Protection standards and even though the tax falls alike on those who deal with the Federal and State Governments. The Supreme Court should note probable jurisdiction to receive briefs and argument on such a far-reaching rule!

c) *Substantial Questions were Raised Under England -vs- Louisiana Medical Examiners,*

374 U.S. 411 and The Doctrine of Collateral Estoppel. [*Questions 6, 7*] l.

Why was the Government permitted to return to the Federal Court and relitigate the same constitutional challenges which it had processed through the Montana courts to the steps of the U.S. Supreme Court? The dissent below (App. 25) points out that the majority opinion doesn't specify the "issues it feels weren't decided in the State Court and why". Clearly the Government voluntarily by stipulation, submitted its federal claims for decision in the state courts. It didn't reserve anything for decision in the federal court. It controlled the state court litigation. (See conceded elements of control App. 86, Agreed Fact 12) Since there is an *England* rule which would prevent this great expense of time, trouble and uncertainty in directly-duplicated litigation, why wasn't it applicable here? This is a substantial question.

England -vs- Louisiana Medical Examiners, 375 U.S. 411, 11 L.Ed. (2d) 440, 84 S. Ct. 461 (1964)

Finally, why did not the doctrine of collateral estoppel bar the Federal Government's relitigating in the Federal Court the same basic challenges of Supremacy Clause discrimination and Equal Protection discrimination which the state court received and rejected?

Southern Pacific Railroad -vs- United States, 161 U.S. 1, 48, 18 S. Ct. 18, 42 L. Ed. 355 (1897)
Garander -vs- Public Bank, 417 F. (2d) 75, 82 (1969)

CONCLUSION

The lower court majority fundamentally erred in areas of tax law involving inter-sovereign relationships where the rules must be unambiguously set out for the several states. Prior to the lower court's decision, the rules of the *Dravo* line plus *Phillips Chemical* were clear. The subsequent *Fresno* case was also wholly consistent with such rules. Simply stated these rules required: that any state tax on private citizens must meet 14th Amendment Equal Protection classifications standards; and when the tax has overtones as to the Federal Government, the tax must not favor those who deal with the state over those who deal with the Government (*Phillips Chemical*); and finally, the tax on those who deal with the Federal Government must be the same as on others similarly situated. (*Fresno County* case) The lower court rejects these rules. It measures for equality of tax treatment at the level of the sovereigns where the economic impact is only indirect and incidental rather than at the level of the tax payers who deal with the sovereigns, and it then deducts the tax itself from the economic impact on the state to create an alleged imbalance between sovereigns in violation of the Supremacy rule. Furthermore in this inter-sovereign field it refuses to recognize the applicability of Equal Protection rules for determining valid tax classification even though the tax is on private individuals and, as with any tax, there are some private individuals included and some excluded. By identifying the Government with the included taxpayers and comparing it under Supremacy rules with the excluded taxpayers, the lower court invariably finds "discrimination". Such alleged discrimination would not exist if the Court would recognize (or test for)

valid classification under Equal Protection rules; for the tax-payers who deal with the Federal Government would then be compared to similarly situated *taxpayers* and no inequality would be noted.

Such combined uses of the Supremacy doctrine substantially exclude the several states from taxing private individuals doing business with the Government. This will severely limit the abilities of states to perform their varied functions.

It is of the greatest importance to Montana and to the several states that this Supreme Court note probable jurisdiction and pass upon the foregoing substantial issues.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1977

No. 77 1134

UNITED STATES OF AMERICA,

Appellee,

v.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W.A. GROFF, Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

An Appeal from the United States District Court for the District of Montana Helena Division

APPENDIX TO JURISDICTIONAL STATEMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF America,

Plaintiff,

v.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W.A. GROFF, Director of Revenue of and for the State of Montana, and his successors in office,

Defendants.

CIVIL ACTION NO. 1989
FINAL DECLARATORY JUDGMENT
AND DECREE OF PERMANENT
INJUNCTIVE RELIEF

Filed and Entered Oct. 18, 1977

Before: KILKENNY, Circuit Judge, and EAST and SMITH, District Judges*

EAST, Senior District Judge, and SMITH, Chief Judge, with KILKENNY, Senior Circuit Judge, dissenting and specifically joining:

Based upon the decision of the majority of the three-judge District Court entered herein on August 19, 1977, it is

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*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of April 28, 1971, of the Honorable James R. Br[illegible]g, U.S. Circuit Judge for the Ninth Circuit, William G. East, [illegible]or U.S. District Judge for

ADJUDGED AND DECLARED that the provisions of the State of Montana's public contractors' licensing and Gross Receipts Tax Act, Chapter 35, Title 84, Revised Code of Montana, as amended, (the Act) and the rules and regulations promulgated thereunder, insofar as they apply to the United States of America, its contractors, subcontractors and those with whom it deals, are in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and are, therefore, unconstitutional and void as to said United States of America, its contractors, subcontractors and those with whom it deals, and in enforcement thereof.

DECREED that the State of Montana, its officers, agents, employees, attorneys and those persons in active concert or participation with it or under its authority, are hereby permanently enjoined from enforcing the Act and the rules and regulations promulgated thereunder as against the United States, and its contractors, subcontractors and those with whom it deals, and from imposing, assessing or collecting any license fees or taxes provided for in the Act against the United States of America, its contractors, subcontractors and those with whom it deals.

Further, it is

ORDERED that the issue of the United States of America's claim for recovery of the overplus of license

---

the District of Oregon, and Russell E. Smith, Chief Judge for the District of Montana. Thereafter pursuant to the designation of the Honorable James R. Browning, Chief Judge for the Ninth Circuit under date of July 13, 1976, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable John F. Kilkenny, Senior U.S. Circuit Judge for the Ninth Circuit, in lieu of the Honorable James R. Browning, and the redesignation and appointment of the Honorable William G. East and the Honorable Russell E. Smith.

fee and gross receipts tax paid to the State of Montana pursuant to the terms of the Act be remanded to the single judge District Court for determination, and the present injunctive restraint of general fund disposition by the State of Montana of such overplus is to remain in full force and effect until further order of the single judge District Court.

Finally, it is

ORDERED that except for the continuation of the above-mentioned injunctive restraint of general fund disposition, execution of the foregoing declaratory judgment and decree of injunctive relief be stayed for a period of 60 days after the entry of this judgment and decree, or if an appeal is timely filed in the United States Supreme Court on or before that date, until the matter is finally resolved by that Court.

The Clerk's mailing of a copy of this declaratory judgment and decree of permanent injunctive relief through regular United States postal service mailing to the defendants' attorneys of record shall constitute good notice to all of the State of Montana's officers and agents engaged in the enforcement of the Act.

WILLIAM G. EAST
SENIOR U.S. DISTRICT JUDGE

RUSSELL E. SMITH
UNITED STATES DISTRICT JUDGE

KILKENNY, Senior Circuit Judge, specifically joining:

I join in the foregoing Final Declaratory Judgment and Decree only to the extent of granting the stay of execution pending a timely appeal to and ultimate disposition of the cause by the United States Supreme Court.

JOHN F. KILKENNY
SENIOR U.S. CIRCUIT JUDGE

Dated this 17 day of October, 1977.

DECISION

Before: KILKENNY, Circuit Judge, and EAST and SMITH, District Judges*

EAST, Senior District Judge:

The Action:

The United States of America, by and through an appropriate delegate of the Department of the Army, (Government) filed this action in April, 1971 against the State of Montana and the above named officials of that state (State). During the proceedings, the three-judge District composed of Judges Browning, East and Smith postponed the proceedings during the pendency of a state court action culminating in the decision of the Supreme Court of the State in *Peter Kiewit Sons' Co. v. State Board of Equalization,* 161 Mont. 140, 505 P. 2d 102 (1973), [*Kiewit*].

---

*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of April 28, 1971, of the Honorable James R. Browning, U.S. Circuit Judge for the Ninth Circuit, William G. East, Senior U.S. District Judge for the District of Oregon, and Russell E. Smith, Chief Judge for the District of Montana. Thereafter pursuant to the designation of the Honorable James R. Browning, Chief Judge for the Ninth Circuit under date of July 13, 1976, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable John F. Kilkenny, Senior U.S. Circuit Judge for the Ninth Circuit, in lieu of the Honorable James R. Browning, and the redesignation and appointment of the Honorable William G. East and the Honorable Russell E. Smith.

A final pretrial order was filed by the parties wherein the Government challenges the validity of the State's public contractors' licensing and Gross Receipts Tax (G.R. Tax) Act, Chapter 35, Title 84, Revised Code of Montana 1947, as amended, (the Act)[1] and regulations promulgated thereunder under Article VI, Clause 2, (Supremacy Clause) and the Fourteenth Amendment (Equal Protection Clause) to the United States Constitution, and seeks:

(a) Declaratory and injunctive relief against the enforcement of the Act against it, its contractors, subcontractors, and others with whom it deals (Contractors); and

(b) A refund of unlawful taxes paid by the Government through its Contractors.

Following oral argument before this three-judge District Court, the matter was submitted upon the merits based upon the evidentiary record made before the Honorable Russell E. Smith and the records and files herein.

Jurisdiction:

We note jurisdiction under 28 U.S.C. §§ 1345 and 2201.

[1] For a concise history and statement of the purposes of the Act, see *Kiewit*, 505 P. 2d at 104-06. In short, the Supreme Court of Montana labels the Act as a legislative "revenue enforcing measure designed to operate hand in hand with (the State's) long-standing personal property tax and income tax, to ensure more effective tax collection and reduce tax avoidance."

The Act:

The Act provides:

(a) The definition of a public contractor is anyone who proposes and does perform work for the government, state, its county or municipal governments, and school districts, and is required to meet standards or grounds to determine fitness and responsibility in order to: (1) submit bids or proposals, (2) enter into contracts with the government, and (3) perform or continue his contractual obligations with the government, and is subject to suspension of the contractor's license upon stated conditions.
(R.C.M. 1947 § 84-3501 (b)).[2]

(b) It is unlawful for a public contractor to act in his capacity within the state without having a public contractor's license[3] and paying the G.R. Tax of one percentum of the value of the contractor's prime contract.
(R.C.M. 1947 §§ 84-3505 (5) and 84-3516.

(c) Methods for a public contractor to obtain a refund from and to the extent of the G.R. Tax, the amount of ad valorem personal property taxes ultimately assessed and paid to the appropriate local taxing authorities of the state, and

[2] It was held by the Supreme Court of Montana in *Kiewit* that the regulatory provisions of the Act do not apply to the United States, and the parties have stipulated that the regulatory provisions are not in issue here.

[3] The Act provides for fixed fees for A, B, and C licenses ranging in cost from $200 for an A license to $10 for a C license. The holders of B and C licenses are limited as to the value of the public contract which they may undertake. R.C.M. 1947 § 84-3505 (1) to (4). No issue arises as to those fees.

income and corporate income taxes ultimately determined to be due and paid to the state. (R.C.M. 1947 § 84.3514).

(d) For a preferred classification of private contractors who perform construction contracts for private persons, partnerships, joint ventures, private corporations (including those listed on the New York and American Stock Exchanges) or other non-governmental groups (private contracts) through an exemption to obtain a public contractor's license or pay the G.R. Tax.

Contentions of the Parties:

The Government contends that:

1. The licensing and G.R. Tax provisions of the Act and regulations thereunder are erroneous, invalid, and without legal force or effect because both the language and the operation of the Act violate the Constitution and laws of the United States in that they:

(a) Illegally discriminate against the Government, and its agencies and instrumentalities, and those with whom the Government does business.

(b) Illegally force the Government to pay more for its construction than does a private person, business, or corporation.

(c) Illegally discriminate against those with whom the Government does business.

(d) Illegally provide a system of refunds and credits that discriminate against an out-of-state contractor in favor of a Montana contractor and place a heavier tax burden on such out-of-state contractor.

(e) (The system of refunds and credits) illegally interferes with the Government's free choice to choose its contractors and frustrates the policy of

choosing the lowest bidder (in violation of federal procurement law).

2. The G.R. Tax was intended by the State's legislature as a "wash-out" revenue-enforcing measure and, accordingly, each year after all refunds and credits are taken by a Contractor or at the termination of each contract, the State must refund any excess G.R. Tax collected under the Act. Hence, the Government is entitled to a refund of taxes and license fees, with interest, equal to all such amounts or sums as have been paid to the State by the Government or its Contractors under the Act in excess of all refunds and credits taken.

The State contends that:

1. The G.R.Tax, which has worked out by virtue of credits and refunds to be actually a tax of one-half of one percent, is not a direct tax upon the Government so any economic impact upon the Government therefrom is indirect and not substantial.

2. The G.R. Tax is imposed equally and identically upon all public contractors, such that the State, and its subdivisions, are treated exactly the same as the Government.

3. The Act in no sense (either through refunds and credits or otherwise) discriminates against in-state and out-of-state Contractors.

4. The Government, as acknowledged in the pretrial order (item 12-(g), page 7), was the real party in interest in *Kiewit*. Therefore, under the doctrine of *England v. Medical Examiners,* 375 U.S. 411 (1964), (*England*) and *Drummond v. United States,* 324 U.S. 316 (1945), (*Drummond*), the Government elected to litigate its challenges to the constitutionality of the Act fully in the State Courts of Montana in *Kiewit* and is barred from relitigating the same again.

5. Further, the Government is collaterally

estopped from relitigating the following issues which it caused to be raised and decided:

(a) The reasonableness and validity of the classification for the tax purposes between public contracts and private contracts;

(b) The inapplicability of the Act as to the Government's selection or control of its Contractors; and

(c) That the tax is not directly on the Government and that any indirect economic impact is not substantial within the concepts of *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

Facts:

We find from the pretrial order agreed facts and evidence of record the following:

1. The Government, prior to and since enactment of the Act, has and will continue to contract with Contractors to perform construction work within the State to erect, build, excavate, alter or repair buildings, structures, installations of facilities for itself, its agencies and instrumentalities, including its Department of the Army.

2. Contractors performing construction contracts in the State are subject to the following three taxes:

(a) Personal property taxes payable to appropriate counties.

(b) Corporation License taxes, or income taxes based on net income, payable to the State.

(c) One percent G.R. Tax applicable to contract proceeds under construction contracts awarded by the Government.

3. Private contractors performing construction contracts in the State for private parties; *i. e.*, for parties

other than the Government, the State or political subdivisions thereof; are subject to the following two State taxes:

(a) Personal property taxes payable to counties in the State.

(b) Corporation license taxes, or income taxes, based on net income, payable to the State.

4. Prior to 1971, the Government contractually required its Contractors within the State not to take advantage of the refund provisions and credits provided for in the Act. Such a requirement was contained in the contracts involved in *Kiewit*. However, since 1971 the Government's contracts, as those involved here, required the Contractors to take advantage of all refunds and credits provided for in the Act and to reimburse the Government in the amount of them. The inescapable effect of the G.R. Tax is to increase the cost to the Contractors for doing business with the Government within the State. Some Contractors add the tax as a line item in their bids. It is inevitable that the increased cost will be passed on to the Government. The State's tax records show that after deducting all credits allowable on account of the payment by Contractors for ultimately assessed personal property and income taxes and corporate license fees, the State retains in its general fund approximately one-half of the G.R. Tax. This overplus or non-washout is an average figure because the tax credits which may be taken vary between Contractors. One Contractor may use more valuable personal property than another and one Contractor may be liable for either state corporate license fees or income taxes while another is not. As the credits which may be taken vary, the amounts of the Contractors' G.R. Tax actually retained by the State also vary. For example, an average Contractor performing a $5,000,000 contract for the

Government would, after credits, pay an overplus of G.R. Tax of slightly less than one-half of one percent, or $25,000. That amount constitutes general revenue to the State[4], a substantial part of which amount has been paid by the Government.

5. Subordinate public entities of the State experience the same adverse tax effect under their public contracts; however, the State does not because of its retention as general revenue of approximately one-half of the G.R. Tax paid.

6. The net amount of the G.R. Tax, after allowing all tax credits, paid by in-state based public contractors and retained in the general fund of the State is .44 of the G.R. Tax, and the net amount of the G.R. Tax paid by out-of-state public contractors and retained in the general fund of the State is .46 thereof.

Discussion and Conclusions:

State's Contention 5:

We meet a threshold disposition of the State's contention 5 raising the issue of a foreclosure of the Government's contentions under the doctrine of res judicata and judicial estoppel in view of the decision in *Kiewit*.

This issue was first raised herein immediately following the decision in *Kiewit* through the State's motion for a summary judgment under the rationale of *England* and *Drummond*. The motion was denied under the reasoning of this Court's decision entered on the 20th day of November, 1974. That decision reserved for later

[4] Since the Act has been in effect, it has produced up to July, 1975, general revenue to the State from Government contracts in the amount of $5,658,437.29, all in the face of legislative and judicial disavowal of intent to do so.

decision as to whether the holdings in *Kiewit* were dispositive of any of the ultimate pretrial order Government issues of unequal treatment. We will later herein meet that challenge. The decision also concluded that Government's asserted issue that the Act's provisions as applied to it violated the Supremacy Clause "remain(s) viable and uffettered by any holding in *Kiewit*."

We now reach that same conclusion.

Government's Contention 1 [a] and [c]:

We deem these two contentions to be one and the same.

It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G.R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G.R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G.R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G.R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G.R. Tax and gets no return of the overplus of approximately 50 percent.[5]

Homestake-Sapin Partners V. United States, 375 F. 2d 507, at 512 (10th Cir. 1967), teaches:

[5] The Supreme Court of Montana in *Peter Kiewit Sons' Co. v. Department of Revenue,* 166 Mont. 260, 531 P. 2d 1327, at 1328 (1975), suggests that a Contractor "would be entitled to a refund or some other administrative remedy" for the overplus of the G.R. Tax retained by the State. However, no statutory or administrative procedure for such relief has been presently called to our attention.

"Whether a tax discriminatory against the United States is unconstitutional under the Fourteenth Amendment, the supremacy clause, or both, is a question the Supreme Court has not had occasion to answer. See discussion in *Comptroller of Treasury, Retail Sales Tax Div. v Pittsburgh-Des Moines Steel Co.*, 231 Md. 132, 189 A. 2d 107. Chief Justice Warren in *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 385, 80 S. CT. 474, 480, 4 L.ED. 2d 384, involving discriminatory taxes levied against lessees of government property, intimates that unconstitutionality in discrimination cases stems from the supremacy clause when he says, '...we have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved....Accordingly, it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself.'"

Compare Esso Standard Oil Co. v. Evans, 345 U.S. 495, 500 (1953). *See also United States v. City of Detroit*, 355 U.S. 466, 473 (1958); and *Alabama v King and Boozer*, 314 U.S. 1, 8 (1941).

We conclude and declare that the imposition of the G.R.Tax under the Act upon the Contractors subjects the Government to discrimination in favor of the State, all in violation of the Supremacy Clause. We further conclude that the Government is entitled to permanent injunctive restraint of future imposition of the G.R. Tax upon its Contractors in order to alleviate the discriminatory effect of the Act as applied to it.

Government's Contention 1 [b]:

In view of our holding that the Act violates the Supremacy Clause, we find it unnecessary to pass upon the Equal Protection Clause issues or upon the questions of collateral estoppel arising as to them.

However, nothing in the issues raised presented, nor did the contractor Kiewit have standing to raise on behalf of the Government in *Kiewit*, the Government's current issue of the discriminatory effect upon it as an owner-builder by the imposition of the G.R. Tax upon its Contractors in violation of the Supremacy Clause. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948).

The decision in *Kiewit* finds a reasonable classification of public contractors, vis-a-vis, private contractors, for different tax purpose[6] treatment under the Act in a recital of some four factors, namely:

(1) A public work is intended for the use of the public, and if the work is inadequate in some particular way, this could expose and would expose some part of the public at large to danger, inconvenience, or injustice. That, of course, would not always be true in the case of a private contractor.

(2) Public contractors must be experienced; they must establish their qualifications to the state or federal government. However, private property owners could engage a licensed or unli-

[6] As heretofore pointed out, the Act is not revenue raising or taxing legislation, but on the contrary it is a measure to enforce other revenue and taxing laws. The evidence is conclusive that when the mission of the Act has been accomplished, as in this case, the State has received and kept in its general fund approximately one-half of the G.R. Tax paid by Contractors.

censed contractor or an experienced or inexperienced one.

(3) Public contractors invariably must provide a bond. Private works require bonds only at the election of the owner.

(4) Public works normally would involve elaborate, professionally drawn plans and specifications. They would also include mandatory supervison or inspection. Private works would have such inspection and/or supervision at the option of the owner.

It must be assumed for validity of such rationalization that those factors or reasons are subjects of and enforceable under state law; otherwise they are mere suppositions. Yet by reason of State's judicial decree and administrative action, none of the Act's requirements for the fitness, financial responsibility or supervision applies to Contractors.

It is manifest to us that as between Contractors and large structure private contractors,[7] there is no reasonable or rational factual basis for the demonstrated unequal treatment under the Act.

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[7] It is common knowledge that throughout the United States, the Government contracts with private owner-builder parties for the construction and leasing of huge structures for governmental use.

There is relevant and substantial evidence in the record that there are no significant differences between a contractor's bid on an identical private project, vis-a-vis, a project to be performed for the Government; *i.e.*, the private construction of large band buildings and the Big Sky Ranch project or the Government's construction of a post office or courthouse building. The same type of construction-problems can be encountered in a private contract as in a public one, and the only essential difference between a federal construction project and an identical construction project performed for a private person, business or corporation is that the ultimate cost is approximately one percent greater to the Government.

"The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." *United States v. County of Fresno*, No. 75-1262, slip op. at 10 (U.S. Jan. 25, 1977).

"If anything is settled in the law, it is that a State may not discriminate against the Federal Government or its (Contractors). *See, e.g., Phillips Co. v. Dumas School District*, [*supra*]; *United States v. City of Detroit*, [*supra*]; *City of Detroit v. Murray Corp.*, 355 U.S. 489." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, at 751 (1961).

We conclude and declare that the imposition of the G.R.Tax upon Contractors discriminates against the Government in favor of private contractors, all in violation of the Supremacy Clause. We further conclude that the Government is entitled to permanent injunctive restraint against the State's future imposition of the G.R.Tax upon Contractors.

Government's Contention 1 [d]:

The facts disclose that the system of refunds and credits applicable to the G.R. Tax under the Act discriminates against out-of-state public contractors in favor of in-state public contractors to the extent of .02 of one percent, or two cents on each $100 of a bid amount.

We conclude that that amount in a dollar and cents discriminatory effect is de minimis and the

contention is without merit.

Government's Contention 1 [e]:

While the facts reveal that the existence of the Act with its imposition of the G.R. Tax upon Government Contractors tends to chill the field of federally qualified contract bidders, yet there is no substantial evidence in the record that the Government has been materially frustrated in its procurement law policy or mandate of choosing the lowest bidder on any specific project.

We conclude the issue is without merit.

Governments Contention 2:

We deem it expedient and in conservation of judicial time and effort that this issue of the Government's recovery of the overplus of the G.R.Tax paid to the State in excess of all allowable refunds and credits be remanded to the single judge District Court for disposition under further order by the Honorable Russell E. Smith, Chief Judge for the District.

The injunctive restraint of general fund disposition by the State of such overplus of G.R.Tax held by the State is to remain in force and effect until further order of the single judge District Court.

Neither party shall recover costs in these three-judge District Court proceedings.

This decision shall constitute the findings of fact and conclusions of law of this three-judge District Court as provided by Fed. R. Civ. P. 52 (a).

Counsel for the Government is requested to serve and submit within 25 days from the date hereof a proposed declaratory judgment and decree of permanent restraint in accordance with the foregoing decision.

Dated this _____day of _____,1977.

_____

U.S. SENIOR CIRCUIT JUDGE
s/ William G. East

U.S. SENIOR DISTRICT JUDGE

s/Russell E. Smith

UNITED STATES DISTRICT JUDGE

UNITED STATES v STATE OF MONTANA, NO.1989.

KILKENNY, Circuit Judge, Dissenting:

I dissent. For ease of reference, I prefer to state my own version of the relevant facts.

BACKGROUND

The Montana Act levies a 1% tax upon the gross receipts of "public contractors," defined to include all persons who perform contracts for the State of Montana, its subdivisions, and the United States Government (the federal government). The Act contains provision for refunds and credits: contractors who produce proof of payment of personal property taxes receive a *pro-rata* refund of taxes paid; the balance of the tax may be claimed as a credit against Montana personal income and corporate taxes.

In its 1971 action, the federal government sought both a declaratory judgment as to the constitutionality of the Act and an injunction prohibiting the collection of the tax and ordering a refund of the taxes previously collected. In May of 1971, this court, pursuant to a stipulation of the parties, granted a continuance until such time as the Montana courts could consider the Act. The Montana Supreme Court considered the Act on two occasions and ruled against the federal government both times.

In the first, *Peter Kiewit Sons' Co. v. State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 (1973) [*Kiewit # 1*], the federal government concedes that it was the real party in interest. Relevant to the present inquiry, *Kiewit # 1* resolved the following issues:

(1) It held that the Act did not have the effect of imposing a tax directly upon the federal government.
(2) It held that the statutory classification between public and private contractors was rational and constitutional such that there could be no discrimination against either the federal government or the public contractors.
(3) It held that there was no discrimination against the federal government because the Act complied with equal force to all public contractors.

In *Peter Kiewit Sons Co. v. Department of Revenue*, _____Mont. _____, 531 P.2d 1327 (1975) (*Kiewit # 2*), the Montana Supreme Court reaffirmed its earlier decision and held that *Kiewit # 1* was *res judicata*. It also held that a reasonable classification for tax purposes lay between public and private contractors and that the Act was a legitimate revenue raising device.

After the decision in *Kiewit # 1*, both parties moved for summary judgment in this court. The state, in arguing that the case should be dismissed under the authority of, *inter alia*, *England v. Medical Examiners*, 375 US.411 (1964), claimed that the federal government tried its case in the state courts and left no issues for decision by the federal court. This court, however, specifically declined to rule on these *res judicata* and collateral estoppel issues on the ground that at least "...some of the (federal) Government's presently asserted issues of violation of the Supremacy Clause remain viable and unfetted by any holding in *Kiewit* (#1). ..."
(Filed November 20, 1974).

Before us, the federal government advances the

same arguments it made in the state courts, and continues to maintain that the Act discriminates against it. The state takes the opposite position and, in addition, claims that the federal government is precluded from relitigating these issues on either *res judicata* or collateral estoppel principles.

PRELIMINARY CONSIDERATION

At various places throughout the majority opinion, *see, e.g.*, footnotes 1, 4, and 6, the majority intimates that its decision is based at least in part upon a view of the legislative history of the Act and the treatment given it by the Montana Supreme Court (in *Kiewit # 1*). The majority indicates that the Act has resulted in the raising of revenue, "all in the face of legislative and judicial disavowal of intent to do so." This is wrong and totally overlooks what the Montana Supreme Court said in *Kiewit # 2*. Kiewit made the same argument there: it argued that the Act was constitutional only insofar as it created a fund from which the state could secure the payment of income taxes and personal property taxes; any amount remaining after such payment, the argument goes, had to be refunded to the individual contractor. The Montana Supreme Court expressly rejected this argument:

> "Kiewit insists that the only basis for this Court's conclusion that the Act was not discriminatory as to the public contractors was that if the Act were properly enforced, it would result in a 'washout'; that is, refunds of personal

> property taxes and contrators' income taxes would offset the 1% gross receipts tax. *Kiewit reads our opinion much too narrowly. We held there that a reasonable classification for tax purposes lay between private and public contractors.*" (emphasis supplied). 531 P. 2d at 1328-9.

Clearly, the Supreme Court of the State of Montana held that the Act was a legitimate revenue raising device. We are faced, therefore, with only two general issues, the *res judicata*/collateral estoppel one, and the issue involving the propriety of the tax under the Supremacy Clause.

RES JUDICATA AND COLLATERAL ESTOPPEL

Because I disagree with the substantive holdings of the majority, it is unnecessary to even consider its treatment of the above issues. Nevertheless, it is important that I express my firm views on these issues.

At the outset, I must say that I am unable to understand the majority's treatment of this problem. It at no point distinguishes between the doctrines of *res judicata* and collateral estoppel in its one-paragraph discussion. On the basis of this court's November 20, 1974, decision (denying the summary judgment motions), the majority summarily concludes that "the Supremacy Clause issue" remains. This is a gross misinterpretation of that decision which concluded merely that "...*at the least, some* of the Government's presently asserted issues of violation of the Supremacy Clause remain viable and unfettered by any holdings in *Kiewit* (#1)...." (Emphasis supplied). The majority does not distinguish between the variety of Supremacy

Clause issues that were raised. Nor does it mention the issues that were tried and decided in *Kiewit #1*. [1]

[1] As relevant to the present inquiry, this court, in its 1974 decision, listed the following issues as among those considered in *Kiewit # 1*:

"(1) The 1% gross receipt tax did not entirely 'wash out' (the gross receipt tax collected aggregated more than the contractor's corporate income and personal property taxes which became payable to Montana and its subdivisions) upon the part of some non-resident contractors and tended to impose a higher overall tax liability to Montana upon those contractors than upon resident contractors. The Supreme Court concluded that this increased liability was due to those contractors' own action or fault and not to any discriminatory effect through the workings of the Act, and in any event, the effect of the non-washout of the receipts tax collections was of minor consequence and not of unconstitutional status.

"(2) As stated by the Supreme Court, (Kiewit's) primary argument' was that the 1% gross receipt tax is placed upon public construction contractors and not private construction contractors and is discriminatory and lacks equal treatment under the law. The Supreme Court reasoned and held, under Montana decisions based upon federal law, that the several classifications between 'public' and 'private' among contractors were rational, reasonable, and constitutional.

"In addition, the Supreme Court did deal with two issues of alleged discrimination against the Government, namely and as stated by that court:

"(a) The second half of the discrimination question raised by (Kiewit) is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private nongovernmental parties.' That argument was rejected through the rationale that the Government suffered no discrimination since the Act applied with equal force to Montana and its subdivisions in their public contracts. Nevertheless we point out that such a conclusion does not absolve the manifest adverse effect of the operation of the Act and regulations upon the *non-resident* prospective or firm *public* contractors and the favoritism allowed *resident* prospective or firm *public* contractors who hold a higher potential base of tax liability to Montana, thereby narrowing the field of public contractors open to the Government.

"(b) Finally, it (was) argued that this Act violates the immunity of the federal government from taxation or the economic impact of taxation.' This argument was rejected under federal law."

The majority leaves us in the dark as to the issues it feels remain and why.

For example, it here considers and upholds the propriety of the classification between resident and non-resident contractors even though it felt in 1974 that *Kiewit #1* had disposed of the issue. [2] Similarily, the majority completely avoids the fact that the Supremacy Clause issues (relied upon by it to invalidate the Act) were already decided by the Montana Supreme Court in *Kiewit #1*. In short, the majority's failure to indicate whether and to what extent the federal government is bound by the prior litigation has only obscured the nature of the issues to be decided.

England applies where the federal government "freely and without reservation" submits its federal claims for decision to the state courts. The federal government has not shown us when or how it informed the state courts of any intention to return to the federal court. On the record here presented, I can only conclude that the federal government did so submit its claims.

Moreover, in its conclusion that the Act was

[2] I find no indication in *Kiewit # 1* that this issue was in fact decided by the Montana Supreme Court such that we could not consider it. In its 1974 decision, however, see footnote 1, this court felt otherwise. Were I to reach the merits of this issue, in any event, I would be in complete agreement with the substantive holding of the majority that any discrimination is *de minimus*.

The happenstance difference in treatment referred to in the majority opinion (.44% v. .46%) does not approach constitutional dimension even though there is favoritism to the extent that resident contractors *are presumed* to have a higher potential base of tax liabilitly in the state of Montana. Each contractor, in any event, receives *identical tax treatment under the Act*. The Act itself makes no distinction.

unconstitutional on the two substantive grounds, the majority did not specifically consider the application of the collateral estoppel doctrine. From its conclusion that these two issues remained open after *Kiewit #1*, it says by implication that the doctrine would apply to bar consideraton of the issues if they had been presented in the state court. I agree with this implication, and think that the issues were raised.

I conclude that the federal government had the requisite control over the litigation in the state courts.[3] Having such control, it was bound by the outcome. *Drummond v. United States,* 324 U.S. 316 (1945). *See generally Expert Electric, Inc. v. Levine,* 554 F. 2d 1227 (CA2 1977); *American Safety Flight Systems v. Garrett Corp.,* 528 F.2d 288 (CA9 1975); *Aerojet General Corp. v. Askew,* 511 F. 2d 710 (CA5 1975), *cert. denied* 423 U.S. 908; *Troy Company v. Products Research Co.,* 339 F. 2d 364, 367 (CA9 1964); *petition for cert. dismissed, 381 U.S. 930 [1965].* *see also* 1B Moore's Federal Practice §0.411(6); Restatement of Judgments §84, Comment (e) (1942). At a minimum, therefore, the federal government is collaterally estopped from relitigating the issues that were tried in state courts. Thus, even if the *England* rule does not apply, I would conclude that the doctrine of collateral estoppel applies and that it precludes our consideration of the merits of the two substantive issues reached by the majority.

[3] To support its position that the federal government was bound by the decisions in the prior litigation, the State refers us to the *admitted* facts regarding the extent of the federal government's participation in *Kiewit # 1:*

(1) The federal government required that the lawsuit be filed by Peter Kiewit.

(2) The federal government reviewed and approved the complaint.

(3) The federal government paid the attorneys fees and costs involved in the action.

(4) The federal government directed the appeal from the state district court to the Montana Supreme Court.

(5) Before the Montana Supreme Court, the federal government appeared as *amicus curiae,* submitted a brief and participated in oral argument.

(6) The federal government was the real party in interest in the state court litigation.

(7) The federal government directed the filing of a notice of appeal to the United States Supreme Court.

(8) The federal government, through the Solicitor General, effectuated Kiewit's abandonment of its appeal to the United States Supreme Court.

The federal government maintains, *inter alia,* that the above facts demonstrate an insufficient amount of participation to say that it had a "laboring oar" in the state court controversy. *Drummond v. United States,* 324 U.S. 316 (1945). I disagree.

MERITS

Assuming, *arguendo,* that the merits are properly before us, I would oppose the majority views.

It concludes that the Act discriminates against the federal government and in favor of the state. Its conclusion, I believe, is fundamentally unsound.

The majority reasons that:

> "...the State would receive as general revenue that portion of the G.R. Tax remaining after allowing credits and refunds. ...Contra, the (federal) Government ... gets no return of the overplus of approximately 50 percent."

Thus, the majority correctly finds that this state tax results in state revenue (that portion of the tax retained after refunds and credits). It goes on, however, to erroneously find that the existence of this state revenue works a discrimination against the

federal government because there is no corresponding revenue to the federal government. This reasoning, if followed to its logical conclusion, would effectively invalidate the state taxes routinely upheld in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), and *James v. Dravo Contracting*, 302 U.S. 134 (1937).

Dravo, for example, involved a two percent gross receipts tax imposed by the state of West Virginia upon contractors performing work in the state. Dravo Contracting was constructing dams and locks in the area pursuant to a contract with the United States. The Court dismissed the constitutional challenges and upheld the tax despite the economic burden upon the federal government. Likewise, the Court in *King & Boozer* refused to invalidate a two percent Alabama sales tax which was passed on to the federal government contractors under a "cost-plus" contracts with the federal government:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." 314 U.S. at 8-9.

The reasoning of the majority *sub silentio* overrules this and other authority. In each of the above cases, the tax would apply equally to those doing work for the state government. Applying the reasoning of the majority, there is discrimination against the federal

government because the otherwise legitimately collected tax (general state revenue) reduces the state's net cost, thereby allowing it to spend less than the federal government. Thus, under the guise of discrimination against the federal government, any state tax could be traced backwards to defeat its own existence.

Nor can the federal government support its discrimination claim with statistics showing an economic impact upon it. *King & Boozer* and *Dravo* upheld taxes with a more severe economic impact than is present here. More recently in *United States v. Boyd*, 378 U.S. 39, 50-1 (1964), the Supreme Court expressed its approval of *Boozer* and its predecessors in clear and precise language as follows:

> "The principles laid down in *King & Boozer*, ...we think, strike a proper judicial accomodation between the *interests of the States' power to tax and the concerns of the Nation, they are workable, and we adhere to them.* If they unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its powers, not this Court, to make the desirable adjustment." (Emphasis supplied).[4]

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[4] This same thought has been echoed by the Supreme Court on a number of other occasions. As long ago as 1943, *Penn Dairies v. Milk Control Comm'n.*, 318 U.S. 261, 270-1, the Court stated:

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those

The proper test for discrimination is found in *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376 (1960), a case cited to us by both parties in support of their positions. *Phillips* dealt with a tax by the state of Texas on lessees of property from the federal government, which tax did not apply to lessees of property from the state of Texas as lessor. In striking down the state tax as discriminatory against the federal government, the Court laid down a relatively simple test:

> "...it does not seem too much to require that the State treat those who deal with the (federal Government as well as it treats those with whom it deals itself." *Id.* at 385.

The majority erroneously reads this case, and presumably this test, as supportive of its decision. The fact is, however, that all public contractors under the Montana Act, whether working for the

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imposed on citizens of the United States within the state's borders, (citation). *And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system,* (citation)." (Emphasis supplied).

See also United States v. City of Detroit, 355 U.S. 466, 474 (1958):

"Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law. (Citation). *Of course this is not to say that Congress, acting within the proper scope of its power, cannot confer immunity by statute where it does not exist constitutionally.* Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve." (Emphasis supplied).

state or the federal government, are treated in identical fashion; each of them is subject to the same one percent gross receipts tax. The state of Montana, therefore, does "treat those who deal with the (federal) government as well as it treats those with whom it deals itself." *Id.* The Montana courts came to this same conclusion and I think that they were correct. See also *International Paper Co. v. County of Siskiyou*, 515 F.2d 285 (CA9 1974).

OTHER CLAIMS

With little more than a scant reference to the Act's "discriminatory effect upon it (the federal government) as an owner-builder...," the majority concludes that it is not precluded under the collateral estoppel doctrine from considering the propriety of the classification between public contractors and private contractors. Its collateral estoppel argument is, of course, without merit.[5] Moreover, its reference to a discriminatory effect upon the government is misplaced. This case would have been thrown out of court six years ago if the tax were being placed upon the federal government *as a contractor*. The fact is that it is not. The federal government complains only about the higher prices it must pay as a result of the tax upon its contractors.[6]

Its conclusion that the Act discriminates against the federal government and in favor of private parties, is meritless.

Because of its earlier holding of unconstitutional-

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[5] *Kiewit # 1* decided this precise issue adverse to the contention of the federal government. *See* footnote 1, *supra.*

[6] This claim must be rejected. *See* text accompanying footnote 4.

ity, the majority" ... find(s) it unnecessary to pass upon the Equal Protection Clause issues or upon the questions of collateral estoppel arising as to them." It, nevertheless, then finds that:

> "...(h)owever, nothing in the issues raised presented, nor did the contractor Kiewit have standing to raise on behalf of the Government in *Kiewit*, the Government's current issue of the discriminatory effect upon it as an owner-builder by the imposition of the G.R. Tax upon its Contractors in violation of the Supremacy Clause." (Citation omitted).

Because the interests of the federal government are implicated, the majority correctly treats this "equal protection clause" issue as implicating the Supremacy Clause. *Kiewit # 1* did the same thing and cited the same Supremacy Clause cases, but it found the Act constitutional on this ground:

> "The second half of the discrimination question raised by appellant is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private nongovernmental parties. Appellant contends granting a preferred tax status to a substantial number of taxpayers, contractors performing work for private owners, and failing to grant a comparable status to construction contractors of the United States, constitutes unconstitutional discrimination against the United States and those with whom it deals."
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> * * * * *
>
> "Here, we do not believe that the state of Montana has discriminated against the federal government." 505 P.2d at 109.

It is clear, therefore, that the next couple of pages of the majority disposition contain only *dicta* (because unnecessary to its findings of unconstitutionality), and bad *dicta* at that (because the issue was foreclosed on collateral estoppel grounds and because it is wrong on the merits). *Kiewit # 1* held that a valid tax classification lay between public and private contractors and I do not think that the federal government has shown otherwise. I find no evidence in the record to show that the federal government met its burden of proof. Testimony offered by the state of Montana, on the other hand, attests to the real and substantial differences between the two classes of contractors. For equal protection purposes, there is a very liberal standard of review and cases will be upheld if there is any conceivable basis which will support the classification. *See, e.g., Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910). *Cf. San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 40-1 (1973). Essentially the same test is applied in cases related to intergovernmental tax immunity under the Supremacy Clause. Chief Justice Warren in the *Phillips* case, however, indicated that the equal protection cases are not controlling, and that the (federal) government's interest must be weighed in the balance to ascertain whether the state treats similarly-situated constituents in a similar fashion. 361 U.S. at 385. As noted above, this condition is satisfied here in that all contractors are subject to the same exact tax. In that all contractors are subject to the same exact tax. In short, I think that the federal government has failed in its burden of showing the classification improper. In view of the standard of review. I would uphold the classification.

The balance of the federal government's arguments in support of its discrimination claim have been rejected in state court. If they were properly before us, I would find them meritless too.

In particular, the argument that the Act places the legal incidence of the tax upon the federal government is without merit. See 505 P2d at 110. A much stronger argument on this ground was available in *King & Boozer*, the situation involving a cost-plus contract where it is clear that the 2% tax was passed on to the federal government, but the Court upheld the state tax. Cases such as *United States v. Mississippi Tax Comm'n.*, 421 U.S. 599 (1975); *Agricultural Bank v. Tax Comm'n.*, 392 U.S. 339 (1968); and *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954) are clearly distinguishable.

CONCLUSION

Independent of the *res judicata* and collateral estoppel issues, I reject the majority's conclusion that the Act discriminates against the federal government and in favor of both the state of Montana and private parties within the state. The state has exercised its power to raise revenue in an even-handed fashion by taxing all those similarly situated (public contractors) in the same manner. *United States v. County of Fresno*, _____ U.S. _____ (1/25/77), slip op. at 10. *Cf. Kiewit # 2*, 531 P.2d at 1329; *State ex rel. Schultz Lindsay v. Board of Equalization*, 145 Mont. 380, 403 P. 2d 635 (1965). The contrary holding of the majority directly undermines all recent authority in this area. Any increased costs to the federal government, so heavily relied upon by the majority, are "but a normal incident of the organization within the same territory of two

independent taxing sovereignties...."[7] Additionally, private parties within the state are not illegally favored because the federal government is not in the same class with them.

I would reject all the government's contentions and dismiss its complaint with prejudice.

[7] See King & Boozer, supra, 314 U.S. at 9.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989
Filed Dec. 15, 1977

UNITED STATES OF AMERICA,

Plaintiff,

—vs—

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W.A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Montana, Department of Revenue of the State of Montana and W.A. Groff, as Director of Revenue of and for the State of Montana, and his successors in office, the Defendants above-named, hereby appeal to the Supreme Court of the United States from the whole of that Final Declaratory Judgment and Decree of Permanent Injunctive Relief dated October 17, 1977 and filed and entered on October 18, 1977.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

Dated this 15th day of December, 1977.

ROBERT CORCORAN, Chief Attorney,
Department of Revenue and ROBERT A. POORE
and TERRY B. COSGROVE,

Special Assistant Attorneys
General of the State of Montana

By S/Robert A. Poore

Attorneys for the Defendants
Suite 400, Silver Bow Block
Butte, Montana 59701

MONTANA'S CONTRACTORS' GROSS RECEIPTS TAX

[the Act]

84-3501. (2433.1) **Definitions.** The following words, terms, and phrases in this act are, for the purposes hereof, defined as follows:

(1) A "public contractor" within the meaning of this act shall include any person who submits a proposal to or enters into a contract for performing all public construction work in the state with the federal government. State of Montana, or with any board, commission, or department thereof or with any board of county commissioners or with any city or town council or with any agency of any thereof or with any other public board, body, commission, or agency authorized to let or award contracts for any public work when the contract cost, value, or price thereof exceeds the sum of $1,000.

(2) The term "public contractor" includes subcontractors undertaking to perform the work covered by the original contract or any part thereof, the contract cost, value, or price of which exceeds the sum of $1,000.

(3) "Gross receipts" means all receipts from sources within the state, whether in the form of money, credits, or other valuable consideration, received from, engaging in, or conducting a business, without deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, taxes, losses, or any other expense whatsoever. However, "gross receipts" shall not include cash discounts allowed and taken on sales and sales refunds, either in cash or by credit, uncollectible accounts written off from

time to time, or payments received in final liquidation of accounts included in the gross receipts of any previous return made by the person.

84-3502. (2433.2) **Unlawful to engage in public contracting business without license.** It shall be unlawful for any person or any combination of persons to engage in the business or act in the capacity of public contractor as herein defined within the state of Montana without having a license therefor as herein provided.

84-3503. (2433.3) **State department of revenue as registrar.** The state department of revenue of the state of Montana is hereby constituted the registrar for the purpose of this act, and is empowered to employ such assistance and to procure such records, supplies and equipment as may be necessary to carry out its provisions.

84-3504. (2433.4) **Application for license—contents.** To obtain a license under this act, the applicant shall submit, on such forms as the registrar shall prescribe, an application, under oath, which shall contain a statement of the applicant's experience and qualifications as a contractor; the value and character of contract work completed, and for whom performed during five (5) years prior to the filing of such application; and a complete financial statement on such forms and disclosing such information as shall be required by the registrar. Such application shall also contain such other information as may be requested by the registrar under such rules and regulations as may be adopted by said registrar and which will assist said registrar in determining the applicant's fitness to act in the capacity of a public contractor as defined in this act; and such application shall also contain a statement

that the applicant desires the issuance of a license under the terms of this act, and shall specify the class of license applied for as hereinafter provided.

84-3505. (2433.5) Classes of licenses—rights granted under licenses—fees.

(1) There shall be three (3) classes of licenses issued under the provisions of this act; and such classes of licenses are hereby designated as Classes A, B, and C. Any applicant for a license under the provisions hereof, shall specify in his application the class of license applied for.

(2) The holder of a Class A license shall be entitled to engage in the public contracting business within the state of Montana without any limitation as to the value of a single public contract project, subject, however, to such prequalification requirements as may be imposed by the public body or bodies referred to in section 84-3501 (1) and at the time of making the application for such license the applicant shall pay to the registrar a fee in the sum of two hundred dollars ($200).

(3) The holder of a Class B license shall be entitled to engage in the public contracting business within the state of Montana, but shall not be entitled to engage in the construction of any single public contract project of a value in excess of fifty thousand dollars ($50,000); and shall pay unto the registrar as a license fee the sum of one hundred dollars ($100) for such Class B license at the time of making application therefor.

(4) The holder of a Class C license shall be entitled to engage in the public contracting business within the state of Montana, but shall not be entitled to engage in the construction of any single public contract project of a value in excess of twenty-five

thousand dollars ($25,000); and shall pay unto the registrar as a license fee the sum of ten dollars ($10) at the time of making application therefor.

(5) In addition to the fees enumerated above, each public contractor shall pay to the state an additional license fee in a sum equal to one per cent (1%) of the gross receipts from public contracts during the income year for which the license is issued; provided, however, that the additional license fee hereby imposed shall not be paid upon or collectible from the gross receipts from any public contract which has been let to bid, upon which bids have been awarded, or which has been executed by a public body and a public contractor on the effective date of this act, and provided further, that the additional license fee shall be computed upon the basis of the entire contract for each separate contract let by any of the public bodies as specified in section 84-3501 (1). The prime contractor shall withhold the additional one per cent (1%) license fee from payments to his sub-contractors and inform the state department of revenue, on prescribed forms, of the amount of the additional one per cent (1%) license fee in his account to be allocated and transferred to the sub-contractor. The notification to transfer portions of the additional one per cent (1%) license fee must be filed within thirty (30) days after each payment is made to sub-contractors. If any prime contractor fails to file the required allocation and transfer report at the time required by or under the provisions of this act, a penalty computed at the rate of ten per cent (10%) of the additional one per cent (1%) license fee withheld from sub-contractors shall be due from the prime contractor.

(6) Nothing herein shall require any contractor to

pay any license fee on any public contract project of a value less than one thousand dollars ($1,000), nor shall any contractor be required to have a license hereunder in order to submit a bid or proposal for contracts advertised to be let by the Montana highway commission where federal aid is obtained from the bureau of public roads or the department of agriculture of the United States; neither shall a successful bidder be required to be licensed as provided herein before the awarding and execution of any contract to be let by the state highway commission where federal aid from the bureau of public roads or the department of agriculture of the United States is involved.

84-3506. (2433.6) **Investigation of applicant and granting of license—renewals—fees.** It shall be the duty of the registrar to investigate and determine the applicant's fitness to act in the capacity of public contractor, as defined in this act, and no license shall be issued unto such applicant until the expiration of ten (10) days from and after the filing of such application. The license so issued in pursuance of the first application shall entitle the licensee to act as a public contractor within this state, subject to the limitations of such license, until the expiration of the then current calendar year.

Any license issued under the provisions of this act may be renewed for each successive calendar year by obtaining from the registrar a certificate of renewal thereof. For the purpose of obtaining such certificate of renewals, the licensee shall file with the registrar an application therefor, stating the class of license applied for and containing the same information as that required in the application for the original license.

Application for such certificate of renewal must be made to the registrar on or before the first day of March of each successive calendar year; and such renewal certificate shall be good for the then current calendar year.

At the time of filing the application for a certificate of renewal, the applicant shall pay unto the registrar a license fee equal to fifty (50) per cent of the license fee for the original license; provided that if any applicant for a certificate of renewal shall apply for a renewal under a different class from the license theretofore issued to him, such new license shall only be issued upon the same showing and under the same terms and conditions and upon payment of the same fee required for the issuance of an original license.

All certificates of renewal, wherein the applicant does not apply for a change in the class of license shall be issued by the registrar to the applicant forthwith when the application is filed and the license renewal fee paid.

84-3507.(2433.7) **Bids to show bidder is licensed, is not presently working overtime on any incomplete contract, and class of bid.** All bids and proposals for the construction of any public contract project subject to the provisions of this act shall contain a statement showing that the bidder or contractor is duly and regularly licensed hereunder and is not presently working beyond the contract time, including authorized time extensions, on any previously awarded public contract project. The number and class of such license then held by such public contractor shall appear upon such bid or proposal, and no contract shall be awarded to any contractor unless he is the holder of a license in the class within which the value of the project shall fall

as hereinbefore provided, and unless the public contractor has completely executed any previous contract upon which he has worked beyond contract time.

84-3508. (2433.8) **Disposal of fees.** All moneys collected hereunder shall be deposited by the registrar with the state treasurer, who shall credit them to the general fund of the state.

84-3509.(2433.9) **Records**—public may inspect—certified copies—fees. The registrar shall maintain in said registrar's office at Helena, Montana, open to public inspection during office hours, a complete indexed record of all applications and all licenses issued and all certificates of renewal and of cancellations or suspensions thereof; and shall furnish a certified copy of any license issued, of renewal certificates, or of the cancellations or suspensions thereof, upon receipt of the sum of one dollar ($1.00); and such certified copy shall be received in all courts and elsewhere as prima facie evidence of the facts stated therein.

84-3510. (2433.10) **Complaints against licensee—grounds—investigation—hearing—suspension of license—appeals.**

(1) Any person or other organization may file a duly verified complaint with the registrar charging that the licensee is guilty of one or more of the following acts or omissions:

(a) abandonment of any contract without legal excuse;

(b) diversion of funds or property received under express agreement for prosecution or completion of a specific contract under this act or for a specified purpose in the prosecution or completion of any contract and their application or use for any other

contract, obligation, or purpose with intent to defraud or deceive creditors or the owner;

(c) the doing of any willful fraudulent act by the licensee as a public contractor in consequence of which another is substantially injured;

(d) the making of any false statement in any application for a license or renewal thereof;

(e) the failure to comply with the provisions of 82-1926 requiring preference of products manufactured or produced in this state by Montana industry and labor.

(2) Upon the filing of such complaint, the registrar shall investigate the charge and within 60 days after the filing of such complaint shall render and file said registrar's decision with said registrar's reasons therefor. If the registrar's decision be that the licensee has been guilty of any of such acts or omissions, said registrar shall suspend the contractor's license. At any time within 20 days thereafter the complainant or the contractor may petition the registrar for a rehearing. In the order granting or denying such rehearing, the registrar shall set forth a statement of the particular grounds and reasons for said registrar's actions on such petition and shall mail a copy of such order to the parties who have appeared in support of or in opposition to the petition for rehearing. If a rehearing be granted, the registrar shall set the matter for further hearing on due notice to the parties and, within 30 days after submission of the matter, serve said registrar's decision after rehearing in like manner as an original decision.

(3) The filing of such petition for rehearing as to the registrar's actions in suspending or canceling such license shall suspend the operation of such action

and permit the licensee to continue to do business as a public contractor pending final determination of the controversy.

(4) Within 30 days after the decision on rehearing, any party aggrieved by such decision of the registrar may appeal therefrom to the district court in and for the county in which the licen[illegible] under this act resides or does business as a public contractor by serving upon the registrar a notice of such appeal. The matter shall thereupon be heard de novo by the district court. An appeal may be taken from the decision of the district court in the same manner as appeals in other civil cases.

(5) In all cases where the licensee has filed his notice of appeal from the decision of the registrar or from the decision of the district court, such licensee shall be entitled to continue to do business as a public contractor pending final decision of the controversy.

84-3511. (2433.11) Relicensing not to be within year of cancellation. After cancellation of a license such licensee shall not be relicensed during the current calendar year in which the offense was committed.

84-3512. (2433.12) Penalty for acting without license. Any person or other organization acting in the capacity of public contractor within the meaning of this act without a license as herein provided shall be guilty of a misdemeanor and shall upon conviction thereof, if an individual, be punished by a fine of not to exceed $500 or by imprisonment in the county jail for a term not to exceed 6 months or by both such fine and imprisonment, in the discretion of the court. The same penalties shall apply upon conviction to any member of a partnership or to any construction,

managing, or directing officer of any corporation or other organization consenting to, participating in, or aiding or abetting any such violation of this act.

84-3513. Retention of contract payments to pay assessments—transmittal to department of revenue—contractor to pay when funds not retained—refunds. The state, county, city or any agency or department thereof, as described in section 84-3501 (1), for whom the contractor is performing public work, shall withhold, in addition to other amounts withheld as provided by law, one per cent (1%) of all payments due the contractor and shall transmit such moneys to the state department of revenue. In the event that the one per cent (1%) of gross receipts is not withheld as provided, the contractor shall make payment of these amounts to the state department of revenue within thirty (30) days after the date on which the contractor receives each increment of payment for work performed by the contractor. Any overpayment of the one per cent (1%) of gross receipts withheld, or paid by any contractor hereunder, shall be refunded by the state department of revenue at the end of the income year upon written application therefor.

84-3514. Corporate license tax credit—additional license fees—treatment of personal tax as credit. The additional license fees withheld or otherwise paid as provided herein may be used as a credit on the contractor's corporation license tax provided for in Title 84, chapter 15, R.C.M. 1947, or on the contractor's income tax provided for in Title 84, chapter 49, R.C.M. 1947, depending upon the type of tax the contractor is required to pay under the laws of the state.

Personal property taxes paid in Montana on any

personal property of the contractor which is used in the business of the contractor and is located within this state may be credited against the license fees required under this act. However, in computing the tax credit allowed by this act against the contractor's corporation license tax or income tax, the personal property tax credit against the license fees herein required shall not be considered as license fees paid for the purpose of such income tax or corporation license tax credit.

84-3515. State department of revenue to establish rules and regulations. The state department of revenue shall establish rules and regulations necessary for the effective implementation of the provisions of this act, including, but not limited to, requiring public contractors to file a contractor's return showing public works contracts performed during a calendar year.

84-3516. Failure to file contractor's license—penalty. A person failing to file a contractor's license return as provided and required by the state department of revenue, upon conviction, shall be fined not less than one thousand dollars ($1,000) or more than ten thousand dollars ($10,000).

(Federal Title of Court and Cause)

STIPULATION FOR CONTINUANCE

Filed 5/25/71

It is hereby stipulated by and between the parties hereto, through their respective counsel of record, that the above-entitled matter may be continued by the Court without date or until further order of the Court pending the resolution in the state courts of Montana or appeals therefrom of the case of *Peter Kiewit Sons' Co., a corporation -vs- State Board of Equalization, et al.*, which is Cause No. 34,859 of the files of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark. It is understood by the parties that reasonable efforts will be made to expedite a final decision in the *Peter Kiewit* case.

It is further stipulated and agreed that from and after this date all license fees or revenues collected by the defendant Board pursuant to Chapter 35 of Title 84, R.C.M. (1947) shall be retained by said Board and not transferred to the general funds of the State until this Federal Court action is finally resolved or until further order of this court; however, such funds may be used by the Board in the ordinary course of administering said act—including making refunds and credits to public contractors.

And it is further stipulated and agreed that the excess of said retained fund over the gross amount of $500,000 shall be invested by said Board in interest-bearing United States notes or bonds. Said investment of these funds is pursuant to this Stipulation and Court order. The said United States notes or bonds shall be held and possessed by said Board. In the event the Plaintiff prevails in the above entitled matter all refunds paid to federal contractors

shall include a prorata portion of the above mentioned interest or earnings; in the event the Defendants prevail in the above entitled action, the above mentioned fund together with the interest or earnings shall be paid over to the State Board of Equalization.

DATED this 24th day of May, 1971.

UNITED STATES OF AMERICA

By Otis L Packwood

Its Attorney

Plaintiff

ROBERT L. WOODAHL, Attorney General
of the State of Montana;
EDWARD JENE BELL, Tax Counsel,
State Board of Equalization; and
POORE, McKENZIE & ROTH, Special
Assistant Attorneys General

By s/Edward Jene Bell

One of Their Attorneys

Defendants

ORDER FOR CONTINUANCE

Pursuant to the foregoing Stipulation, and good cause appearing therefor,

IT IS HEREBY ORDERED that the above-entitled matter be and the same hereby is continued without date or until further order of the Court pending the resolution in the state courts of Montana or appeals therefrom of the case of *Peter Kiewit Sons' Co., a corporation -vs- State Board of Equalization, et al.*, described in said Stipulation; that from and after this date the defendant Board

shall retain all license fees or revenues collected pursuant to Chapter 35 of Title 84, R.C.M. (1947) and not transfer the same to the general funds of said State until this Federal Court action is finally resolved or until further order of this court, however, such funds may be used by the Board in the ordinary course of administering said act—including making refunds and credits to public contractors; and that the excess of said retained fund over the gross amount of $500,000 shall be invested by said Board in interest-bearing United States notes or bonds, that said United States notes or bonds shall be held and possessed by said Board, and that in the event the Plaintiff prevails in the above entitled matter all refunds paid to federal contractors shall include a prorata portion of the above mentioned interest or earnings, however, in the event the Defendants prevail in the above entitled action, the above mentioned fund together with the interest or earnings shall be paid over to the State Board of Equalization.

DATED this 25th day of May, 1971.

Hon. James R. Browning,
Hon. Russell E. Smith,
Hon. William G. East

By s/ Russell E. Smith

(Federal Title of Court and Cause)

NOTICE OF ENTRY OF FINAL JUDGMENT BY SUPREME COURT OF THE STATE OF MONTANA;MOTIONS TO DISMISS FEDERAL DISTRICT COURT ACTION AND TO RELEASE ALL GROSS RECEIPTS TAX FUNDS FROM SEQUESTRATION; CITATIONS OF AUTHORITIES

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a) NOTICE OF ENTRY OF FINAL JUDGMENT BY SUPREME COURT OF THE STATE OF MONTANA

TO: HONORABLE JAMES R. BROWNING, HONORABLE RUSSELL E. SMITH, and HONORABLE WILLIAM G. EAST, Judges Presiding:

and

TO: THE UNITED STATES OF AMERICA and HONORABLE OTIS L. PACKWOOD, Its Attorney:

It will be remembered and the file in the above-entitled matter will show: That on May 24, 1971, the above-entitled Court made and entered its Order for Continuance whereby the matter was continued without date pending the resolution in the courts of the State of Montana of the case of *Peter Kiewit Sons' Co. -vs- State Board of Equalization et al.;* and further,

That also by said Order of May 24, 1971, the above-entitled Court ordered the fees and revenues collected pursuant to Chapter 35 of Title 84, R.C.M. (1947) in part sequestered; and further,

That said State Court action of *Peter Kiewit Sons' Co. -vs- State Board of Equalization et al.* as Cause

No. 34,859 was tried in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark before Honorable Victor H. Fall and Judgment in favor of the defendants and sustaining the constitutionality of the Act in question and against Peter Kiewit and against the contentions of the United States of America as mirrored in the above-entitled action was entered on November 30, 1971, and notice of such entry given in the above-entitled action on December 20, 1971; and further,

That thereafter said plaintiff, Peter Kiewit Sons' Co. perfected an appeal from said State District Court judgment to the Supreme Court of the State of Montana which is the highest court of the State of Montana,

NOW THEREFORE PLEASE BE ADVISED that on January 10, 1973, said Supreme Court of the State of Montana unanimously affirmed the State District court judgment of said Judge Victor H. Fall and although the appellant, Peter Kiewit Sons' Company, filed a Petition for Rehearing, such Petition was denied by Per Curiam Order of said Supreme Court dated January 29, 1973, and on the same date said Supreme Court issued its remittitur to the Clerk of said Montana District Court from whence said appeal had been perfected, and said Judgment is now final. That true and correct copies of the Supreme Court's opinion and of its Order denying said Petition for Rehearing and its Remittitur are affixed hereto.

b) MOTIONS TO DISMISS ABOVE-ENTITLED ACTION AND TO RELEASE ALL GROSS RECEIPTS

TAX FUNDS FROM SEQUESTRATION

Come now the defendants in the above-entitled matter and by virtue of the judgments, recited above, made and entered in the Courts of the State of Montana respectfully move the above-entitled Court to Dismiss the above-entitled action upon the following grounds and reasons:

1. That the opinion of the Supreme Court of the State of Montana affirming Judge Fall's Judgment upholding the constitutionality and validity of the Act in question against the challenges of its being requgnant to the Constitution of the United States is now the law of the State of Montana on the precise issues raised in the above-entitled action, and
2. That no court of the United States, other than the Supreme Court on appeal or certiorari, has jurisdiction to review, vacate, or annul said State Court Judgment.

   Parnacher -vs-Mount, (C.A. Okl. 1953), 207 F. (2d) 788, cert. denied 74 S. Ct. 515, 347 U.S. 917, 98 L. Ed. 1072, and
3. The above-entitled Federal District Court is without jurisdiction to endeavor to change or modify said State Court judgment and is under duty to dismiss this suit since any errors complained of in said State Court judgment could be reviewed only by the Supreme Court of the United States.

   Williams -vs- Tooke (CCA Tex 1940), 108 F. (2d) 758. Cert. Denied 61 S. Ct. 8, 311 U.S. 655, 85 L. Ed. 419

Daniel B. Frazier Co. -vs- Long Beach Tp., Ocean County, N.J., C.C.A.N.J. 1935, 77 F. (2d) 764

Atlantic Coast Line R. Co. -vs- Brotherhood of Locomotive Engineers, 90 S. Ct. 1739, 398 U.S. 281, 26 L. Ed. (2d) 234

Aris -vs- Big Ten Taxi Corp., C.A. Fla 1971, 441 F. (2d) 536
28 U.S.C.A. Sec. 1257; note 8

4. Since the above-entitled Court has no jurisdiction to review, vacate or annul said State Court judgment and is under duty to dismiss this suit as per the foregoing authorities, it is powerless and without jurisdiction to endeavor to continue to sequester or otherwise control the State of Montana's use of funds collected under said act in question.

Respectfully submitted,
ROBERT L. WOODAHL, Attorney General of the State of Montana;
EDWARD JENE BELL, Tax Counsel, Board of Equalization; and
POORE, McKENZIE & ROTH, Special Assistant Attorneys General

By s/Robert A. Poore
One of Their Attorneys

Defendants

(Federal Title of Court and Cause)

AMENDED STIPULATION FOR CONTINUANCE

Filed 5/3/73

The parties to this action, through their undernamed attorneys, having entered into a Stipulation dated May 24, 1971, which Stipulation was incorporated into ths Court's Order for Continuance dated May 24, 1971, now desire to amend said Stipulation and Order to provide as follows:

(1) That the above-entitled matter may be continued by the Court without date or until further order of the Court pending the final resolution of the case of *Peter Kiewit Sons' Co., a Corporation v. State Board of Equalization, et al.*, which was Cause No. 34,859 of the files of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, including any and all appeals to the United States Supreme Court or otherwise. It is understood by the parties that reasonable efforts will be made to expedite a final decision in the *Peter Kiewit* case.

(2) That defendant State Board of Equalization shall retain $948,314.44 in United States Treasury Bills with a $1,000,000 par value at August 28, 1973 maturity date, and $476,666.67 in United States Treasury Bills with a $500,000 par value at October 23, 1973 maturity date, which amounts were invested pursuant to the Stipulation and Order dated May 24, 1971.

(3) That from and after this date all license fees, gross receipts taxes or revenues collected by the defendant Board pursuant to Chapter 35 of Title 84, R.C.M. 1947, shall not be sequestered or otherwise controlled by the Court but may be transferred by said Board to the general funds of the State; provided, however, that if the net refund amount (which

is the gross amount of funds paid under protest less amounts taken as refunds or credits) exceeds the amount invested as stated in paragraph 2 above, the defendant Board shall invest additional monies in interest bearing United States notes or bonds on a dollar for dollar basis equal to the excess of the net refund amount.

(4) That in the event the plaintiff finally prevails in this above-entitled federal action, all refunds paid to the United States or its federal contractors shall include a pro rata portion of the above-mentioned interest or earnings; in the event the defendants prevail, the above-mentioned fund, together with the interest or earnings, shall be paid over to the State Board of Equalization.

DATED this 2nd day of May, 1973.

STATE OF MONTANA

UNITED STATES OF AMERICA

BY:

ROBERT L. WOODAHL, Attorney General of the State of Montana;
EDWARD JENE BELL, Chief Tax Counsel, State Board of Equalization; and POORE, McKENZIE & ROTH, Special Assistant Attorneys General

BY: Edward Jene Bell

UNITED STATES OF AMERICA

BY:

OTIS L. PACKWOOD
United States Attorney

BY: Otis L Packwood
United States Attorney

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Tax Division
U.S. Department of Justice
Washington, D.C. 2530
(202) 739-3056

ORDER FOR CONTINUANCE

Pursuant to the foregoing Amended Stipulation, and good cause appearing therefore,

IT IS HEREBY ORDERED that the Order for Continuance entered in this matter on May 24, 1971, is set aside.

IT IS FURTHER HEREBY ORDERED that the above-entitled matter be and the same hereby is continued without date or until further order of the Court pending the final resolution, by the United States Supreme Court or otherwise, of the case of *Peter Kiewit Sons' Co., a Corporation v. State Board of Equalization, et al.*, as described in said Amended Stipulation; that defendant Board shall retain the United States Treasury Bills in the amounts of $948,314.44 and $476,666.67 which were invested pursuant to the Stipulation and Order dated May 24, 1971; that from and after this date all license fees, gross receipts taxes or revenues collected by the defendant Board pursuant to Chapter 35 of Title 84, R.C.M. 1947, shall not be sequestered or otherwise controlled by this Court but may be transferred from said Board to the general funds of the State in accordance with said Amended Stipulation; and that

in the event the plaintiff prevails in the above-entitled federal action, all refunds paid to the United States or its federal contractors shall include a pro rata portion of the above-mentioned interest or earnings, however, in the event the defendants prevail, the above-mentioned fund, together with the interest or earnings shall be paid over to the State Board of Equalization.

DATED this 3rd day of May, 1973.

Hon. James R. Browning,
Hon. Russell E. Smith
Hon. William G. East

BY Russell E. Smith

(Federal Title of Court and Cause)

RENEWAL OF PENDING MOTION TO DISMISS
AND
MOTION TO ABATE ORDER FOR CONTINUANCE
Filed 9/17/73

TO: HONORABLE JAMES R. BROWNING, HONORABLE RUSSELL E. SMITH, and HONORABLE WILLIAM G. EAST, Judges Presiding:

and

TO: THE UNITED STATES OF AMERICA and HONORABLE OTIS L. PACKWOOD, Its Attorney:

It will be remembered and the file in the above-entitled matter will show that on or about February 7, 1973 the defendants filed Motions to Dismiss the above-entitled Federal Court Action and to Release All Gross Receipts Tax Funds from Sequestration. Appurtenant to such Motions was a recitation of the history of the parallel litigation in the state courts of the State of Montana of the case of *Peter Kiewit Sons' co. -vs- State Board of Equalization et al.*

Subsequent to the filing of said Motions to Dismiss and to Release Funds the parties hereto entered into certain Stipulations (and amendments) for Continuance of the above-entitled matter without conducting a hearing of said pending Motions; and pursuant thereto and by its order of May 3, 1973, the above-entitled Court made and entered its Order for Continuance "without date or until further order of the Court pending the final resolution by the United States Supreme Court or otherwise of the case of *Peter Kiewit Sons' Co.*, a Corporation -vs- *State Board of Equalization, et al.*"

That at the time of this Court's making its said order of May 3, 1973, Peter Kiewit Sons' Co. was in the process of perfecting an appeal to the Supreme Court of the United States from the adverse decision of the Supreme Court of the State of Montana,—the latter Court having decided in said litigation that Chapter 35 of Title 84, R.C.M. (1947) was in nowise unconstitutional as contended both by Peter Kiewit in the State Court litigation and by the United States of America in the above-entitled Federal suit. *Peter Kiewit Sons' Co.* -vs- *State Board of Equalization of the State of Montana, et al,* 30 State Reporter 32, 505 Pac. (2d) 102 decided January 10, 1973.

Subsequent to said order of May 3, 1973, Peter Kiewit filed that certain Motion to Dismiss Appeal in the Supreme Court of the State of Montana a true copy of which is attached hereto as Exhibit "A"; and thereafter and on August 17, 1973 said Supreme Court of the State of Montana dismissed said appeal to the Supreme Court of the United States as per Exhibit "B" hereto.

That by virtue of the foregoing there has now been a "final resolution" of the state court litigation within the specification of the Court's Order for Continuance of May 3, 1973, and the defendant, State of Montana, hereby moves that the Order for Continuance be abated and that the pending Motion to Dismiss of the State of Montana be set for hearing.

DATED this 17th day of September, 1973.

Respectfully submitted,

ROBERT L. WOODAHL, Attorney
General of the State of Montana;

EDWARD JENE BELL, Tax Counsel,
Board of Equalization; and
POORE, McKENZIE, ROTH ROBISCHON &
ROBINSON, Special Assistant
Attorneys General
By s/Robert A. Poore

One of their attorneys
Defendants

(Federal Title of Court and Cause)

MOTIONS FOR LEAVE TO SPECIFY ADDITIONAL GROUND FOR GRANTING DEFENDANTS' PENDING MOTION TO DISMISS AND TO TREAT SUCH MOTION TO DISMISS AS ONE FOR SUMMARY JUDGMENT
Filed 12/12/73

A. Defendants move the Court for leave to amend their pending Motion to Dismiss filed herein on February 7, 1973, by the addition thereto of the following ground No. "5":

> "5. That the plaintiff caused and elected to have all of the issues raised in the above-entitled action and specifically all of its challenges to the constitutionality of the Montana Act here in question (Chapter 35 of Title 84, R.C.M. (1947, as amended) to be fully litigated in the District and Supreme Courts of the State of Montana in the case of *Peter Kiewit Sons Co. -vs- State Board of Equalization of the State of Montana et al.*, (505 P. (2d) 102, 1973); and thereafter plaintiff affirmatively waived a right of appeal from the adverse decision of said Montana Supreme Court to the Supreme Court of the United States; and plaintiff having reserved no material issue for litigation in the above-entitled action, plaintiff therefore now has no right to endeavor to return to the above-entitled Court and re-litigate issues presented to and resolved by the State Courts."

B. Defendants further move the Court under Rule 12(b) F.R. Civ. Pr. to receive matters outside the

pleadings and particularly to receive the attached Affidavit of Robert A. Poore and the documents identified and specified in said Affidavit in support of said pending Motion to Dismiss as supplemented by ground No. "5." next above, and upon having received such outside matters to treat said Motion to Dismiss as one for summary judgment to be disposed of as provided in Rule 56, F.R. Civ. Pr..

The grounds for the foregoing Motions are that justice requires that for proper disposition of Defendants' pending Motion to Dismiss that this Court be fully apprised of the events and proceedings conducted by or on behalf of the parties hereto in the State Courts of the State of Montana since the time on May 24, 1971, when the parties stipulated for a continuance of this case; and of the legal import on this case of such events and proceedings.

DATED this 11th day of December, 1973.

ROBERT L. WOODAHL, Attorney General
of the State of Montana;
TERRY B. COSGROVE, Tax Counsel,
State Board of Equalization; and
ROBERT A. POORE, Special Assistant
Attorney General

By s/Robert A. Poore .....
Attorneys for Defendants
Fourth Floor, Silver Bow Block,
Butte, Montana 59701

(Federal Title of Court and Cause)

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Before: BROWNING, Circuit Judge, and EAST and SMITH, District Judges*

PER CURIAM: Filed 11/20/74

THE CASE

The plaintiff above named (Government) instituted this action against the State of Montana and the Montana State Board of Equalization, and members thereof, (Montana) seeking declaratory judgment and injunctive relief from the workings and enforcement of the Montana legislation designated as Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended by Chapter 195 of the laws of 1967, and the pertinent rules and regulations promulgated thereunder (Act and regulations), and obtaining a refund of taxes heretofore imposed and collected from the Government and its contractors.

The Government alleges:

The Congress, in the Armed Services Procurement Act of 1947 (Title 10, United States Code, Sections 2301 to 2314, among others), and Government Procurement Regulations (32 CFR Sections 1.901 to 1.908-6, among others), has provided for standards or factors to determine and insure the fitness, qualifications, responsibility and reliability of persons and companies contracting with the Federal Govern, ment, including those construction contractors and subcontractors who are presently employed or under contract with the Federal Government in the State of Montana;

The Government, in the performance of its governmental functions, has entered and will enter into contracts for the employment of contractors and subcontractors to perform construction work within

Montana to erect, build, excavate, alter and repair buildings, structures and installations for itself, its agencies and instrumentalities, including its Department of the Army;

The Act and regulations, as enforced by Montana, require contractors and subcontractors, in order to submit bids or proposals to the Federal Government or to enter into contracts with the Federal Government for performing public construction work or to perform their contractual obligations with the Federal Government, (a) to obtain a Public Contractor's License (Section 84-3502 of the license fee statute provides that it is unlawful for a person to engage in the business or act as a public contractor in Montana without having a Public Contractor's License),(b) to be subject to licensing requirements and regulations and to meet standards or grounds to determine fitness and responsibility which are similar in part to the hereinbefore described grounds for finding responsibility and fitness under the hereinbefore described federal statute and regulations, (c) to pay a license fee ($10 to $200), and (d) to pay an additional 1% license fee or tax on gross receipts derived from or measured by the value of contracts with the Federal Government;

Government has incurred and will continue to incur liability for license fees or taxes imposed upon and collected by Montana from federal contractors and subcontractors under the application of the Act and regulations in that Government's contractors and subcontractors have passed and will continue to pass the cost of such taxes or license fees on to Government because provisions of the contracts involved require the Government to reimburse said contractors and subcontractors for the amounts remitted by

them to Montana in amounts in excess of $10,000.

The Government asserts that the Act and the enforcement thereof as aforesaid by Montana contravene the constitution and laws of the United States of America, and asserts these issues of constitutional infringements and violations (issues):

(a) Illegally discriminate against the Government and its agencies and instrumentalities, and those with whom it does business;
(b) Illegally impose a tax on Government's contractors and subcontractors which is not uniform upon the same class of subjects;
(c) Illegally and improperly interfere with the Government's power to select contractors and are in conflict with federal law and policy regulating federal procurement;
(d) Illegally violate the immunity of the Government and its instruments from state control in the performance of their functions;
(e) Illegally frustrate the federal policy of selecting the lowest possible bidder; and
(f) Illegally constitute a review by Montana over the federal determination of responsibility and fitness of its contractors and subcontractors.

For the purpose of this decision, we categorize the first two issues as falling within the equal treatment under the law guarantees of the United States Constitution, and the remaining four issues as falling within the Supremacy Clause protection.

JURISDICTION

We note the jurisdiction of this court under §§1345, 2201, and 2281, *et seq.*, *Title 28 U.S.C.*

ORDER OF CONTINUANCE

This cause was set for a hearing upon the Govern-

ment's motion for a preliminary injunction on May 24, 1971. Among the claims to be heard was Montana's assertion that this court "should abstain from acting (on Government's claims) pending disposition in the First Judicial District Court, Lewis and Clark County, Montana, (District Court) of a prior pending case, *Peter Kiewit Sons' Co., a corporation, Plaintiff, v. State Board of Equalization of the State of Montana, et al.* [*Kiewit*].

On the day and just prior to the hour of hearing, Government and Montana entered into a stipulation for the continuance of this cause which provides in its pertinent parts that:

> This cause "may be continued by the Court without date or until further order of the Court pending the resolution in the state courts of Montana or appeals therefrom of the case of [*Kiewit*]. It is understood by the parties that reasonable efforts will be made to expedite a final decision in [*Kiewit*].
>
> "It is further stipulated and agreed that from and after this date all license fees or revenues collected by the defendant Board pursuant to (the Act) shall be retained by said Board and not transferred to the general funds of the State (Montana) until *this Federal Court action is finally resolved* or until further order of this court; however, such funds may be used by the Board in the ordinary course of administering said act—including making refunds and credits to public contractors.
>
> "And it is further stipulated and agreed that the excess of said retained fund over the gross amount of $500,000 shall be invested by said Board in interest-bearing United States notes or bonds. Said investment of these funds is pursuant to this Stipulation and Court order." (Emphasis supplied).

Then follows provisions for the distribution of the principal and accruing interest of such notes and bonds to the *prevailing party in this cause* respectively.

The stipulation was approved and this cause continued "without date or until further order of the Court," all in accordance with the stipulation by order of Chief Judge Smith, as a member of this 3-Judge District Court.

Thereafter the District Court adjudicated *Kiewit* adversely to Kiewit's state law and the United States constitutional claims, and entered an order dismissing Kiewit's complaint and cause. Kiewit appealed from that adjudication and order of dismissal to the Supreme Court of Montana (Supreme Court). The Government appeared in that appeal amicus curiae. The Supreme Court affirmed, 30 Mont. 32, 505 P.2d 102, 1973.

Following that decision and pending consideration of further appeal, the parties in these proceedings entered into an amended stipulation for continuation which acknowledged the prior stipulation and order of continuance and provided in substance that these proceedings be further continued and for the release from sequestration future receipt tax payments but for the retention of such payments to date. This court approved that stipulation and ordered further continuance of the proceedings.[1]

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[1] For the purposes of this phase, we assume in *arguendo* that the orders of continuance were orders of abstention and note that the abstention doctrine allows federal courts, in appropriate cases, to

Kiewit did not ultimately perfect an appeal to the United States Supreme Court, and the affirmance is now final.

MOTIONS UNDER SUBMISSION

Montana has moved that the Government's complaint and cause be dismissed, which motion is now considered as a Motion for Summary Judgment as provided for in Rule 56, Federal Rules of Civil Procedure, primarily on the grounds:

> "That the plaintiff caused and elected to have all of the issues raised in the above-entitled action and specifically all of its challenges to the constitutionalitly of the Montana Act here in question (Chapter 35 of Title 84, R.C.M. (1947), as amended) to be fully litigated in the District and Supreme Courts of the State of Montana in (Kiewit); and thereafter plaintiff affirmatively waived a right of appeal from the adverse decision of said Montana Supreme Court to the Supreme Court of the United States; and plaintiff having reserved no material issue for litigation in the above-entitled action, plaintiff therefore now has no right to endeavor to return to the above-entitled Court and re-litigate issues presented to and resolved by the State Courts."

defer deciding federal constitutional questions pending determination by state courts of unsettled questions of state law entwined in the federal questions. *Meridian v. Southern Bell T. & T. Co.*, 358 U.S. 639, 640 (1959); *United Gas Co. v. Ideal Cement Co.*, 369 U.S. 134, 135-136 (1962). We "made this clear only last Term in ...*Button, supra*,...at 427, when we said that 'a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim.' We also made clear in *Button*, however, that a party may elect to forego that right." *England v. Medical Examiners, infra*. We do not today decide and hold open the query whether or not the Government under the facts and circumstances presented "freely and without reservation" submitted its federal constitutional claims to the courts of Montana for final decision. *England, infra*, at 419, 421 and 422.

The Government has also moved for Summary Judgment, and the cross motions for Summary Judgment have been submitted on the record. We deny each of the cross motions.

MONTANA'S MOTION FOR SUMMARY JUDGMENT

Montana urges that the issues raised in *Kiewit* were substantially the same, if not identical, with the issues raised in these proceedings, and further, that following the order of continuance herein, the Government was the financing and moving party to the litigation in *Kiewit* in the Montana courts. Accordingly, urges Montana, the issues raised herein are res judicata under the rationale and holdings enunciated in *England v. Medical Examiners*, 375 U.S. 411 (1964), as extended in *Drummond v. U.S.*, 324 U.S. 316 (1945),[1] and if not, the doctrine of collateral estoppel bars the Government herein. 1B Moore's Federal Practice ¶ 0.405, pages 621-622 and 632-633; *Vanderveer v. Erie Malleable Iron Company*, 238 F.2d 510 (CA3, 1956).

A scrutiny of the decision of the Supreme Court reveals that the court opined that the purpose of the Act was "to require some (non-resident contractors) of the contractors working in the state to meet their

[1] We assume in *arguendo* that the Government was a party to Kiewit in the sense and context as utilized in *Drummond*.

(Montana corporate, income and personal property) tax responsibilities" and generally that the Act was valid. These issues of United States' constitutional infringement upon Kiewit, the Government contractor, were dealt with:

(1) The 1% gross receipt tax did not entirely "wash out" (the gross receipt tax collected aggregated more than the contractor's corporate income and personal property taxes which became payable to Montana and its subdivisions) upon the part of some non-resident contractors and tended to impose a higher overall tax liability to Montana upon those contractors than upon resident contractors. The Supreme Court concluded that this increased liability was due to those contractors' own action or fault and not to any discriminatory effect through the workings of the Act, and in any event, the effect of the non-washout of the receipts tax collections was of minor consequence and not of unconstitutional status.

(2) As stated by the Supreme Court, "Kiewit's) primary argument" was that the 1% gross receipt tax is placed upon public construction contractors and not private construction contractors and is discriminatory and lacks equal treatment under the law. The Supreme Court reasoned and held, under Montana decisions based upon federal law, that the several classifications between "public" and "private" among contractors were rational, reasonable, and constitutional.

In addition, the Supreme Court did deal with two issues of alleged discrimination against the Government, namely and as stated by that court:

(a) "The second half of the discrimination question raised by (Kiewit) is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private nongovernmental parties." That argument was rejected through the rationale that the Government suffered no discrimination since the Act applied with equal force to Montana and its subdivisions in their public contracts. Nevertheless we point out that such a conclusion does not absolve the manifest adverse effect of the operation of the Act and regulations upon the *non-resident* prospective or firm *public* contractors and the favoritism allowed *resident* prospective or firm *public* contractors who hold a higher potential base of tax liability to Montana, thereby narrowing the field of public contractors open to the Government.

(b) "Finally, it (was) argued that this Act violates the immunity of the federal government from taxation or the economic impact of taxation." This argument was rejected under federal law.

(c) The Supreme Court also held "as did the district court, that the provisions of the Act which pertain to qualifications or competence of public contractors is not applicable to federal contractors." However, that court made no adjudication thereon and we conclude that such a judicial statement is not adverse to the Government's allegations of Montana officials' enforcement to the contrary.

We deem it unnecessary at this phase to decide

and do reserve deciding whether the above holdings in *Kiewit* are dispositive of any of the ultimate pretrial order Government-asserted issues of unequal treatment *to it* as distinguished from the individual contractor because we conclude that, at the least, some of the Government's presently asserted issues of violation of the Supremacy Clause remain viable and unfettered by any holding in *Kiewit*. Accordingly Montana's Motion for Summary Judgment should be denied.

GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

As stated above, we are concerned primarily at this phase with the Government's Supremacy Clause issues.

We find that the stipulated and agreed facts as submitted are not sufficient to support appropriate findings of fact and conclusions of law upon which to grant relief on any of the Supremacy Clause issues from Montana's application and enforcement of the Act; furthermore, the counter affidavits filed in support of some of the parties' respective contentions are in conflict and raise genuine issues as to material facts.

We conclude that there are genuine issues as to material facts involved, and the Government is not entitled to a judgment as a matter of law. Accordingly the Government's Motion for Summary Judgment should be denied.

We deem it judicially expedient that this cause be returned to further pretrial procedures for the development of an ultimate separate and distinct

delineation of the Government's specific constitutional claims in a pretrial order of issues entered either by stipulation or order.

DATED this 18th day of November, 1974.

James R. Browning

United States Circuit Judge

William G. East

United States District Judge

Russell E. Smith

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

STATE OF MONTANA, *et al.*

Defendants.

Filed 11/20/74
No. 1989
ORDER

Before: BROWNING, Circuit Judge, and EAST and SMITH, District Judges*

Based upon the decision made and entered herein contemporaneously herewith,

IT IS HEREBY ADJUDGED AND ORDERED that the several motions for summary judgment in favor of the plaintiff United States of America and defendants State of Montana, et al., respectively, are each denied.

DATED this 18th day of November, 1974.

James R. Browning

United States Circuit Judge
William G. East

United States District Judge
Russell E. Smith

United States District Judge

*Honorable James R. Browning, United States Circuit Judge for the Ninth Circuit, William G. East, Senior District Judge for the District of Oregon, and Russell E. Smith, Chief Judge for the

(Federal Title of Court and Cause)
STIPULATION OF COUNSEL
Filed 3/23/76

It is hereby Stipulated and Agreed by and among the parties, through their undersigned attorneys, that the attached Order (concerning the inapplicability of the regulatory provisions of the Montana Act to the United States and its contractors) be submitted to the Court for its approval, all attorneys and their respective clients having agreed and consented to the form, substance and the entry of same.

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JOHN J. McCARTHY, Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

District of Montana, constituting a statutory three-judge district court by designation of Chief Judge H. Chambers for the Ninth Circuit, dated April 28, 1971.

CHARLES E. STRATTON
Trial Attorney-Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-3056
OF COUNSEL
THOMAS A. OLSON
United States Attorney
Attorneys for the Plaintiff,
United States of America

PARTIAL JUDGMENT AND ORDER

Plaintiff, United States of America, having sought a declaratory judgment and a permanent injunction against the defendants from applying both (a) the taxing provisions and (b) the licensing and regulatory provisions of the Montana Public Contractor's Licensing, Regulation, and Gross Receipts Tax Act, Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended, (hereinafter referred to as "Montana Act"), and the rules and regulations promulgated thereunder, against the United States, its contractors and its subcontractors and the Court having considered the entire record now on file in this action with respect to the licensing and regulatory provisions and the Court having been fully advised in the premises, the parties agreeing with respect to the licensing and regulatory provisions and the Court concluding that there is good cause therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the regulatory provisions of the Montana Act are not applicable to the United States, its contractors or its subcontractors by reason of the Federal Constitution, federal law and regulations, the United States

Supreme Court decision of *Miller* v *Arkansas*, 352 U.S. 187 (1956) and the *Montana Supreme Court* decision of *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 F. 2d 102 (1973); nor are any federal contracts subject to state standards, review or supervision, nor do the defendants have any right or authority to suspend any federal contractor's license, nor can the defendants interfere with selection of bidders for the Federal Government.

DATED: March 18, 1976

Russell E. Smith
United States District Judge

(Federal Title of Court and Cause)

Filed 3/30/76

PRETRIAL ORDER

Comes now the plaintiff, United States of America, and the defendants, State of Montana, Department of Revenue of the State of Montana, and W.A.Groff, as Director of Revenue of and for the State of Montana, and his successors in office, by their undersigned attorneys, and in compliance with the local Rules for Pretrial Orders, respectfully submit the following Pretrial Order.

NATURE OF THE ACTION

This civil action, instituted by the United States of America (in April of 1971, with an amended complaint filed on February 12, 1975) seeks from this Court:

(1) A Declaratory Judgment that the Constitution and laws of the United States prohibit the imposition, application, or enforcement of the (a) taxing provisions and (b) the licensing and regulatory provisions of the Montana Public Contractor's Licensing, Regulation and Gross Receipts Tax Act, Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended (hereinafter referred to as the "Montana Act"), and the rules and regulations promulgated thereunder against the United States of America, its contractors, subcontractors, or those with whom it deals;

(2) A permanent injunction against the defendants and those in concert with them from imposing, applying, or enforcing both (a) the taxing provisions and (b) the licensing and regulatory provisions of the Montana Act against the United States of America, its contractors, subcontractors, or those with whom it deals, and

(3) A refund of taxes and license fees imposed on or

collected from the United States of America, its contractors, subcontractors, or those with whom it deals.

PARTIES TO THE ACTION

(1) The plaintiff, United States of America, is a corporate sovereign and body politic.

(2) The defendant State of Montana is a corporate sovereign and body politic, and is joined as a defendant in this action because the action involves an attack on the constitutionality of a Montana statute and its application.

(3) The defendant Department of Revenue of the State of Montana is the agency responsible for the administration and enforcement of tax laws, including the Montana Act and its Regulations (and is the defendant properly substituted for the State Board of Equalization).

(4) The defendant W.A. Groff is the Director of Revenue for the State of Montana, and is joined herein in his official capacity (and is the defendant properly substituted for the individual members of the State Board of Equalization).

STATEMENT OF JURISDICTION

The jurisdiction of this action is conferred upon this Court by Sections 1345 and 2201 of Title 28, United States Code, and a Three-Judge Court is properly invoked in this action pursuant to the provisions of Section 2281 of Title 28, U.S.C., because the plaintiff is attacking a Montana State statute and its application on the grounds of unconstitutionality.

PLEADINGS RAISING THE ISSUES

The issues involved herein are raised in the Amended Complaint and the Answer thereto.

UNDISPOSED OF MOTIONS

There are no Motions which have not been resolved by this Court, nor are there any other matters requiring action by this Court, other than the trial of this action.

AGREED FACTS

The following facts are true, require no proof, and have been agreed upon and stipulated to for the purposes of this action:

I. *GENERAL FACTS*

1. This action has been authorized and requested by a delegate of the Department of the Army, a Department of the plaintiff, United States of America, and is brought under the direction of the Attorney General of the United States.

2. An actual controversy has arisen and now exists between the United States of America and those with whom it contracts with on one hand and the defendants on the other hand, concerning their respective rights and duties.

3. In the performance of its governmental functions, plaintiff, United States of America, has entered into, prior to and since enactment of the Montana Act, and will enter into contracts with, and has employed and will employ, contractors and subcontractors to perform construction work in the State of Montana to erect, build, excavate, alter or repair buildings, structures, installations or facilities for itself, its agencies and instrumentalities, including its Department of the Army.

II. *Federal Law and Regulations Concerning Federal Contracting*

1. Congress, in the Armed Services Procurement Act of 1947 (Title 10, U.S.C., Section 2301, *et seq.*),

and in United States Government Procurement Regulations (32 C.F.R., Parts I-VIII and Parts IX-XXXIX, Sections 1.100, *et seq.*), provide for federal regulations or federal standards to determine and insure the fitness, qualifications, responsibility and reliability of persons, companies, or corporations performing construction work for the United States Govrnment, including those contractors or subcontractors under contract with the United States Government in Montana.

III. *The Regulatory Provisions of the Montana Act*

1. The language of the Montana Act, at all times pertinent hereto, has provided, and still provides that it is unlawful for a person to engage in the business or act in the capacity of a public contractor in Montana without having a Public Contractor's License, without paying a license fee of $10.00 to $200.00 and without paying gross receipts taxes measured by one percent (1%) of the value of all public construction contracts.

2. The Montana Act requires federal contractors, in order to (a) submit bids or proposals, (b) enter into contracts with, and (c) perform or continue their contractual obligations with the Federal Government, to obtain and maintain a Public Contractor's License under the Montana Act and meet standards or grounds to determine fitness and responsibility.

3. The Montana Act provides that the defendants have authority to suspend such Public Contractor's License (Section 84-3510 R.C.M., 1947 as amended).

4. Under the Montana Act and its Regulations a public contractor is defined as anyone who proposes and does perform work for a governmental agency, including the United States Government, State

Government, County Government, Municipal Government, School Districts, Municipal Corporations and Government Corporations.

5. Contractors performing construction contracts for private persons, partnerships, joint ventures, private corporations (including those listed on the New York and American Stock Exchanges) or other non-governmental groups are not required to obtain a Public Contractor's License or pay the one percent (1%) gross receipts tax.

IV. *Administrative Application of the Regulatory Provisions of the Act*

1. The Montana Act is administered by the Department of Revenue of the State of Montana.

2. By reason of the Montana Supreme Court decision of *Peter Kiewit Sons Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 (1973), and the United States Supreme Court decision in *Miller* v. *Arkansas*, 352 U.S. 187 (1956), the defendants, administratively, have accepted the determination that the regulatory and supervision provisions of the Montana Act do not apply to contractors or subcontractors performing work for the Federal Government.

3. Administratively, contractors performing work for the Federal Government are required to obtain and maintain a Public Contractor's License under the Montana Act after a bid had been awarded to such contractor.

4. The Department of Revenue has never required a license of a contractor bidding a federal project.

5. Defendants have determined, administratively, by reason of the *Kiewit* and *Miller* decisions that such federal contractors are *not* subject to state standards

or grounds to determine fitness and responsibility.

6. The Department of Revenue has never interferred in any manner with the Federal Government's selection of its contractors on public works in Montana by reason of the regulatory provisions of the Act.

7. The license for contractors performing work for the Federal Government is an administrative measure to enforce payment of the one percent (1%) gross receipts tax (which is determined by the value of construction contracts performed for the Federal Government). (See MRC, §§42-2.14(2)-S1490(3)).

8. It has been determined by the defendants, administratively, on the basis of the *Kiewit* decision, that the State of Montana has no right or authority to suspend any federal contractor's license. (See MRC §§42-2.14(2)-S1490(4)).

9. The Department of Revenue has never supervised, halted or in any manner interferred with or impeded a contractor performing a federal contract in Montana.

10. After notice and hearing (Section 82-4204 R.C.M., 1947, as amended) and possible court review, the Department of Revenue could amend a rule pertinent to the administration of the Act subject in all events to Legislative review under Section 82-4203.1. R.C.M., 1947, as amended.

11. That the Department of Revenue as the administrative agency for the Act in question has adopted administrative rules pertinent to certain of the Federal Government's past complaints as to the Act and has provided:

(a) Obtaining a license is not a condition precedent for a contractor bidding on any contract for the construction of any federally owned or federally financed project.

(b) Upon being awarded such a contract, a contractor (including a federal contractor) shall obtain or possess a license at the applicable fee and thereafter pay the gross receipts tax herein specified.

(c) As to any contractor holding a contract for the construction of any federally owned or federally financed project, this Act is a revenue measure but nothing in the Act shall constitute authority to the Department of Revenue or any third person to supervise or control the selection of any contractor or review his qualifications, financial standing, past performance or the performance of his job.

12. As to the litigation in the state courts of Montana entitled Peter Kiewit & Sons, Inc. -vs- State Board of Equalization, et al., (citation in No. 1 above) the following obtain:

(a) The U.S. required that Peter Kiewit file the suit.
(b) The U.S. reviewed and approved the complaint.
(c) The U.S. paid Kiewit's attorneys' fees.
(d) The U.S. directed Kiewit's appealing from the District Court to the Supreme Court of Montana.
(e) The U.S. appeared as amicus curiae on appeal and submitted a brief and participated in oral argument before the Montana Supreme Court.
(f) The U.S. directed Kiewit to file a notice of appeal from the Supreme Court of Montana to the Supreme Court of the United States and paid the fees therefore.
(g) The real party in interest as concerns the plaintiff was the United States.

(h) The U.S. through its Solicitor General, Erwin N. Griswold, effectuated Kiewit's abandonment of its appeal to the U.S. Supreme Court.

13. That an issue litigated in said Kiewit case was the existence and validity for tax purposes of the classifications of public contractors -vs- private contractors.

V. *The Taxing Provisions of the Montana Act*

1. The taxing provisions of the Montana Act and its Regulations provide that a gross receipts tax must be paid at the present rate of one percent (1%) of all receipts derived from public construction contracts performed in the State of Montana, including those receipts derived from performing construction contracts for the Federal Government.

2. Under the Montana Act, in addition to the one percent (1%) gross receipts tax, there are three license fees; class C license—$10.00—applies to any single contract amount up to $25,000.00; class B license—license fee $100.00—applies to any single contract amount up to $50,000.00; class A license—license fee $200.00—contract amount unlimited.

3. The taxing provisions of the Montana Act and its Regulations also provide for certain refunds for personal property taxes paid to counties in Montana and credits for income and corporate income taxes paid to the State of Montana.

4. Such refunds and credits are available only up to the amount of the one percent (1%) gross receipts tax paid by the public contractor or public subcontractor.

5. The Act is in part a revenue enforcing measure as to collection of Montana personal property and income taxes.

6. The Taxing provisions of the Montana Act have

resulted in the one percent (1%) gross receipts tax being a revenue-raising measure of approximately one-half of one percent (1%) in addition to being a revenue-enforcing measure of approximately one-half of one percent (1%) (i.e., there is not a "wash-out" of the one percent (1%) gross receipts tax and that the net one percent (1%) gross receipts tax retained by the defendants equals approximately one-half of one percent (1%) after all available refunds and credits have been taken).

7. The taxing provisions of the Montana Act make no provision for refunds of personal property taxes paid in other states or provide no credits for income taxes or corporate income taxes paid to other states.

8. The application of the taxing provisions of the Montana Act is made effective by a determination of whether the awarding party is a public or private entity.

9. That under the provisions of the Montana Act, it is possible that a contractor who performs construction exclusively for the Federal Government within the State of Montana in one year will pay more Montana taxes (if, as is the case for many public contractors, the 1% gross receipts tax does not "wash-out") than a contractor who performs construction exclusively for a private entity, assuming identical circumstances exist for each contractor (i.e., same dollar value of work done, same amount of income and same amount of property located in State), but that it is never possible for a public contractor to pay less taxes, assuming identical circumstances exist.

10. Some of the contractors performing construction contracts for public entities in Montana also perform construction contracts for private parties in Montana.

11. The credit available to a public contractor under the Montana Act with respect to Montana State Corporation License Taxes or individual income taxes is based on the net income tax derived from the private and public contracts he performs in Montana.

12. The Act authorizes a contractor performing construction contracts in Montana for public entities to claim as refunds against (and up to but not exceeding) the one percent (1%) gross receipts tax paid with respect to public contracts in Montana the amount of personal property taxes assessed and paid to counties in Montana with respect to construction equipment or other personal property owned or used by the contractor involved in public construction projects, private construction projects or other private endeavors.

13. Amendments to the Montana Act (Chapter 180 of the Montana Session Laws approved on March 12, 1974) basically provided two things: The first, was that the total amount of the one percent (1%) gross receipts tax for any single contract (including subcontracts) can never be more than one percent (1%); and secondly, it provided for penalty for those prime contractors who failed to submit to the State an allocation record.

14. On contracts awarded by the Federal Government prior to June 30, 1975 (the effective date of the anti-pyramiding and withholding amendment to the Act), a federal prime construction contractor could be taxed at the rate of 1% of the proceeds of the prime contract, in addition, the one percent (1%) gross receipts tax would apply to the gross receipts of the subcontracts. This could result in a total cumulative gross tax in excess of 1% of the total contract price (i.e., there could have been a higher net tax).

15. Contractors performing construction contracts in Montana for a public entity are subject to the following three (3) Montana taxes:

a. Personal property taxes payable to counties in Montana.

b. Corporation license taxes, or income taxes, based on net income, payable to the State.

c. One percent gross receipts tax applicable to contract proceeds of the construction contracts awarded by the United States.

16. Contractors performing construction contracts in Montana for private parties-i.e., for parties other than the United States, the State of Montana or political subdivisions of the State of Montana (such as private corporations listed on the New York or American Stock Exchange) are subject to the following two (2) Montana taxes:

a. Personal property taxes payable to counties in Montana.

b. Corporation license taxes, or income taxes, based on net income, payable to the State.

17. That notwithstanding the provisions for refunds and credits in the act in question it has worked out to be a revenue producing measure or tax of approximately ½ of 1% and a revenue-enforcing measure of approximately ½ of 1% of the gross receipts of a contractor from any applicable public works contract.

18. Since the elimination of the pyramiding possibilities of the tax, it presently never exceeds 1% of the contractor's gross receipts from the public property owner and on average works out to about one-half of 1% because of refunds and credits.

19. That contractors based in-state and performing public contracts in Montana and contractors based

out-of-state and performing public contracts in Montana experience substantially similar tax impact under the Act in that in-state contractors have experienced a net tax of .44 of 1% tax and out-of-state contractors have experienced a net tax of .46 of 1% tax.

VI. *Pertinent Federal Contract Provisions*

1. That federal contracts are awarded after competitive bidding.

2. Prior to 1971, the Army Corps of Engineers contractually required its contractors in Montana not to take advantage of provisions for refunds and credits provided for in the Montana Act and since that date have required them to take advantage of all refunds and credits, including for back periods.

VII. *Highlights of the Audit of State Records*

1. Based on an audit of the Montana State Tax Records of the Montana Department of Revenue, Miscellaneous Tax Division, concerning the Montana public contractors one percent (1%) gross receipts tax (hereinafter referred to as "audit"), it is agreed by the parties that the tax balance retained by the State of Montana or yearly net tax balance paid on public contracts in Montana is approximately fifty percent of the tax collected by defendants or a rate of one-half of one percent (0.50%) of the total public contractor gross receipts.

2. Specifically, the audit reveals that the tax balance or net tax rate paid by out-of-State contractors is 0.46% and Montana based contractors pay a net rate of 0.44%.

VIII. *Tax Collection Under the Act*

1. The following one percent (1%) gross receipts taxes were collected by defendants under the Act (by year):

Year	Gross Receipts	Pers. Property Tax Refunds	Ind. Income Tax Credits	Corp. License Tax Credits	Net
1967	315,362.57	49,996.63	-0-	-0-	263,490.16
1968	1,163,620.21	374,074.63	21,434.18	36,231.13	725,353.57
1969	1,516,725.87	526,438.20	39,488.19	157,029.63	788,611.70
1970	1,855,370.37	681,092.19	54,528.95	192,294.95	941,014.91
1971	1,766,907.55	581,642.00	66,128.98	185,279.01	933,857.56
1972	2,042,845.23	712,204.66	73,828.62	221,721.32	1,035,090.63
1973	1,718,310.88	948,650.12	66,008.91	173,874.96	529,776.89
1974	1,840,594.62	427,203.84	96,381.09	423,294.86	893,714.83
July 7, 1975	620,141.15	617,621.64	122,352.16	332,640.31	-(452,472.96)
	*12,839,878.45	4,918,923.91	540,151.08	1,722,366.17	5,658,437.29

*Totals include $1,500,000.00 invested in Treasury Bills and Interest Earned.

2. The transfer to the general fund covering the years 1968, 1969, 1970, 1971, and 1972 was $2,836,982.56

3. There is an escrow fund in this case and the amount invested in Treasury Bills is $2,975,000.00 with an additional amount of interest of $257,124.72- (by order of this Federal Court).

CONTENTIONS OF THE PARTIES

The plaintiff contends that:

(1) The licensing and regulatory provisions of the Montana Act are erroneous, invalid and without legal force or effect because they are in conflict with the Constitution and laws of the United States of America in that they:

(a) Illegally violate the immunity of the Federal

Government and its instruments from State control in the performance of its functions.

(b) Illegally interfere with the Federal Government's power to select contractors and schedule construction, and are in conflict with federal procurement law and regulations.

(c) Illegally frustrate the federal policy of selecting the lowest possible bidder.

(d) Illegally constitute a review by the State of Montana over the federal determination of responsibility and fitness of its contractors and subcontractors.

(2) The taxing provisions of the Montana Act and Regulations are erroneous, invalid, and without legal force or effect because both the language and the operation of the Montana Act violate the Constitution and laws of the United States in that they:

(a) Illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business.

(b) Illegally force the Federal Government to pay more for its construction than does a private person, business, or corporation.

(c) Illegally discriminate against those with whom the United States does business.

(d) Illegally provide a system of refunds and credits that discriminate against an out-of-state contractor in favor of a Montana contractor and place a heavier tax burden on such out-of-state contractor.

(e) (The system of refunds and credits) illegally interferes with the Federal Government's free choice to choose its contractors and frustrates the policy of choosing the lowest bidder (in violation of

federal procurement law); and

(3) The one percent (1%) gross receipts tax was intended by the Montana legislature as a revenue-enforcing measure, was intended to "wash-out" and, accordingly, each year after all refunds and credits are taken by a public contractor or at the termination of each contract, the defendants must refund any excess gross receipts taxes collected under the Montana Act. See the 2nd Kiewit case, *Peter Kiewit Sons' Co.* v. *Department of Revenue*, 32 Rptr. 209, 531 P. 2d 1327, 1328 (Mont. Sp. Ct., 1975) wherein it was held that "it may be that Kiewit would be entitled to a refund or some other administrative remedy" from the Montana Department of Revenue of the excess of the one percent (1%) gross receipts tax over the offsets allowable under the Montana Act.

(4) The plaintiff is entitled to a refund of taxes, and license fees with interest, equal to all such amounts or sums as have been paid to defendants by plaintiff or its contractors or its subcontractors under the Montana Act in excess of all refunds and credits taken.

Defendants' Contentions:

1. (Immunity of Federal Government from State Regulation) There has been no interference whatsoever by the Defendants under the Act in question with the Federal Government's selection of its contractors, or in the letting of contracts to whomsoever it chooses, or with the performance of its contracts by its contractors.

(a) Factually the Federal Government cannot cite a single instance where the Department of Revenue in the administration of the Act has ever:

1. Required a license of a contractor as a condition precedent to bidding a federal contract.
2. Interfered in any manner with the Federal Government's selection of its contractors.
3. Reviewed in any manner the qualifications or lack of qualifications of any federal contractor or bidder.
4. Ever supervised or reviewed or interfered with a federal contractor's performance of his job with U.S.

(b) Legally the Federal Government cannot justifiably attack the Act as being unconstitutional as posing threats of interference by the Defendants with the Federal Government's selection and supervision etc. of its contractors. Even prior to the *Kiewit* decisions the specified concern of the Federal Government was wide of the mark because of the U.S. Supreme Court doctrine in *Miller* -va- *Arkansas*, 352 U.S. 187 (1956) to the effect that provisions of a state act upon which a state body or agency might attempt interference with the Federal Government's selection of its contractors were NOT APPLICABLE to federal contractors. Now the *Miller* doctrine has specifically been made applicable to this Act here in question. By stipulation this Montana Supreme Court's interpretation of the Act on this very point. In *Kiewit* -vs- *State Board of Equalization, et al.*, 161 Mont. 140, 505 P(2d) 102 the Montana Supreme Court applied the *Miller* rule and held any language of the Act which otherwise could be a predicate for state interference with Federal Government contractor

selection and management was INAPPLICABLE to the Federal Government. Finally in order to write the Supreme Court rule of *Kiewit* case into the language of the Act for administrative purposes and foreclose continuing attacks by the Federal Government, the following administrative rule controlling the Department of Revenue's administration of the Act was adopted:

42-2.14(2)-S1490 CONSTRUCTION OF ACT (3) Obtaining a license is not a condition precedent for a contractor bidding on any contract for the construction of any federally owned or federally financed project; upon being awarded such contract, a contractor shall obtain or possess a license at the applicable fee and thereafter pay the gross receipts tax herein specified.

(4) As to any contractor holding a contract for the construction of any federally owned federally financed project, this Act is a revenue measure but nothing herein shall constitute authority to the Department of Revenue or any third person through the Department (84-3510) to supervise or control the selection of any contractor or review his qualifications including financial standing or past performance records or the manner of performance of his job.

MAC42-2.14(2)-S1490

By virtue of each and all of the foregoing the Federal Government is not justified in endeavoring to challenge the constitutionality of the Act on the ground that it

interfers with its selection, supervision and management of its contractors and violates Federal immunity from state control.

No Tax or Economic Discrimination Against the United States:

2. The act imposes a 1% tax which has worked out by virtue of credits and refunds to be actually a tax of ½ of 1%.

Such tax is levied on the contractor—not on the United States. The United States is not required to pay such tax or to withhold it. Any direct involvement of the United States with the tax arises by its own election in its contractual relations with its contractors. Prior to 1971 the Federal Government involved itself contractually with the tax by requiring its contractors not to take advantage of refunds and credits. Since 1971 the Federal Government has *required* its contractors to include the tax in their bid thereby insuring economic impact on itself. Such direct involvement by the Federal Government in the tax aspects of the Act arises voluntarily and by election and not by legislative provision under the Act. There is no direct tax upon the Federal Government!

If there is economic impact on the Federal Government it is:

(a) Indirect

(b) Not substantial within the U.S. Supreme Court doctrines of *James* -vs- *Dravo Contracting Co.*, 302 U.S. 134; *Leslie Miller* -vs- *Arkansas*, 352 U.S. 187; *Silas Mason* -vs- *State Tax Commission*, 302 U.S. 186.

(c) Imposed equally and identically upon all public contractors such that the State of Montana

(and its subdivisions) are treated exactly the same as the Federal Government.

(d) In no sense (either through refunds and credits or otherwise) discriminates against in-state and out-of-state contractors. The Federal Government's own audit shows in-state effective tax of .44 of 1% and out-of-state tax of .46 of 1%.

So by virtue of the foregoing the Act does not violate the Supremacy Clause (Article VI, Clause, 2, U.S. Constitution); it does not violate the equal protection clause of the 14th Amendment; it does not violate the Commerce Clause Article I, Section 8.

3. The Classification for Tax Purposes between Public Projects and Private Projects—i.e., Between Contractors performing Public Jobs (Public Contractors) and Contractors performing Private Jobs (Private Contractors) is based upon reasonable differences between the two classes and is not arbitrary or capricious.

The present deposition and expected testimony of architect Philip C. Hauck will establish these differences (if the Plaintiff is not estopped as a matter of law from disputing the validity of the classification; see Defendants' contention "5." below.)

4. Under the doctrine of *England* -vs- *Medical Examiners*, 375 U.S. 411 (1964) the Federal Government elected to litigate its challenges to the constitutionality of the Act fully in the State Courts of Montana and is barred from relitigating the same again.

5. The Federal Government is Collaterally Estopped from relitigating the following issues which it as the acknowledged real party in interest in the state court suit of *Kiewit* -vs- *State Board* caused to be

raised and decided:

(a) The reasonableness and validity of the classification for the tax purposes between public contracts and private contracts.

(b) The inapplicability of the Act as to the Federal Government's selection or control of its contractors.

(c) That the tax is not directly on the United States and that any indirect economic impact is not substantial within the concepts of the *Dravo* case.

The United States as real party in interest in the *Kiewit* case caused the foregoing issues to be litigated and decided by the Supreme Court of the State of Montana. A challenge to the resolution made by that Court adverse to Plaintiff's contentions was limited to the appeal to the U.S. Supreme Court which the Federal Government initiated and then abandoned. And the Plaintiff is now collaterally estopped from relitigating those issues in this suit.

LAW PROBLEMS

There are no law problems other than the contentions of the parties.

PERTINENT STATUTES AND REGULATIONS

1. United States Constitution, Article VI, Clause 2 (Supremacy Clause).
2. United States Constitution, 14th Amendment.
3. United States Constitution, Article I, Section 8, Clause 2 (Commerce Clause).
4. Title 10, Section 2301, *et seq.*, United States Code.
5. The Armed Services Procurement Regulations (A.S.P.R.'s), Title 32, Code of Federal

Regulations, Parts I-VIII and Parts IX-XXXIX.

6. Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended, and the Rules and Regulations promulgated thereunder (Chapter 195 of the Session Laws of Montana, approved February 28, 1967, effective July 1, 1967, an Act providing for additional public contractors' license fees for all public construction work in Montana, amending Sections 84-3501 R.C.M. 1947,*et seq.*) (Chapter No. 180 Montana Session Laws of 1947, approved March 12, 1947; Anti-Pyramiding amendment).
7. Montana Administrative Code, Sec. 42-2.14 (2)-S1480, *et seq.*

EXHIBITS

The parties agree to the authenticity of the following exhibits and they are admitted into evidence with no objections:

The following are the plaintiff's exhibits:

1. State of Montana, Department of Revenue, Contract Award Report.
2. State of Montana, Department of Revenue, Experience Questionnaire, Financial Statement and Application for Public Contractor's License (authenticity only) (relevancy challenged) by defendants.
3. State of Montana, Department of Revenue, Gross Receipts Withholding Report.
4. State of Montana, Department Of Revenue, Public Contractor's Accounting Sheets and Cards.
5. State of Montana, Department of Revenue, Application for Refund of Contractors' Gross Receipts tax.

6. Montana Corporation License Tax Return.
7. Montana Individual Income Tax Return.
8. United States Department of the Army, Seattle District Corps of Engineers, Construction Contract with Pacific Ventures, Inc., Bellevue, Washington, Contract No. DACW 67-74-C-0072, Modification No. P00006, dated April 22, 1975.
9. Breakdown sheet, R.A. Heintz Contracts with United States Army Corps of Engineers, Libby Dam Project, Contract No. DACW 67-72-C-0017 and Contract No. DACW 67-69-C-0039. And Contract Nos. DACW 67-71-C-0003 and DAWC 67-67-C-0097.
10. December 15, 1975 and November 19, 1975 Audit Report of John E. Templeton, Division Auditor, North Pacific Division, United States Army Corps of Engineers and Norman K. Jensen, Auditor in Charge, Omaha Resident Audit Office, United States Army Corps of Engineers and any supplements thereto.
11. Breakdown sheet of John E. Templeton to illustrate effects of one percent Montana Gross Receipts Tax.
12. Construction Contract, United States Army Corps of Engineers and Sletten Construction Company, Great Falls, Montana, Contract No. DACW 67-74-C-9001, Modification No. P00001.
13. Construction Contracts and modifications of contractors testifying.
14. Plaintiff's Exhibit illustrating differences between public bid and private bid in State of Montana. (Attached to Deposition of William R. Lowe).

The following are the defendants' exhibits:

The United States has outlined its list of exhibits which shall not be duplicated here in whole or in part; consequently the only exhibit of the Defendants is the transcript of the Federal Government's participation in the hearing on March 24, 1975 directed at adopting regulations governing the Department of Revenue's administration of the Act.

LIST OF WITNESSES

The plaintiff expects to call the following witnesses at trial:

1. John E. Templeton, Auditor in Charge, United States Army Corps of Engineers, North Pacific Division, Portland, Oregon.
2. Norman K. Jensen, Auditor in Charge, Omaha Resident Audit Office, United States Corps of Engineers, Omaha, Nebraska.
3. Herbert B. Hallock, Comptroller, R.A. Heintz Construction Company, 2035 N.E. Columbia Boulevard, Post Office Box 11005, Portland, Oregon 97211.
4. Leo Werre, Certified Public Accountant, for Pacific Ventures, Inc., Portland, Oregon.
5. Merrill A. Moran, Secretary-Treasurer, Sletten Construction Company, Great Falls, Montana.
6. James Madison, Administrator, Miscellaneous Tax Division, Department of Revenue of the State of Montana.
7. Peter Van Parys, Engineer, U.S.Army Corps of Engineers, Washington, D.C.

The Defendants expect to call the following witnesses:

1. James Madison, Department Administrative Head.

2. William Lowe, Contractor.
3. Robert B. McIntyre, Contractor.
4. Philip Hauck, Architect.
5. Philip E. Maronek, Contractor.

ESTIMATED TRIAL TIME

It is estimated that the trial of this case may take 3-4 days.

REQUESTED BRIEFING SCHEDULE

It is requested that the following briefing schedule be adopted by the Court:

1. Trial briefs will be mailed simultaneously by the parties by March 23, 1976.

2. The plaintiff's memorandum of points and authorities will be submitted within 60 days from the date of trial.

3. The defendants' answer brief will be submitted within 45 days thereafter.

4. The plaintiff's reply brief will be submitted within 30 days thereafter.

Respectfully submitted,

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United States of America.

PETER KIEWIT SONS' CO, A Corporation, Plaintiff and Appellant, v. STATE BOARD OF EQUALIZATION of The State of Montana et al., Defendants and Respondents.

No. 12199.
Submitted Nov. 27, 1972.
Decided Jan. 10, 1973.
Rehearing Denied Jan. 29, 1973.
505 P.2d 102.

LICENSES—TAXATION—STATES—CONSTITUTIONAL LAW.

1. **Licenses.**
   Public Contractors' License Act, which requires a 1% tax on all receipts from public contractors in state, including both resident and nonresident contractors, covering all public works within state, including construction done by United States government, and which gives to contractors a dollar for dollar credit on personal property taxes from fund created by payment of tax, was intended as an incentive to public contractors to declare their items of personal property for taxation and as encouragement to contractors to more fairly allocate out-of-state home office overhead expenses, in part at least, to state. R.C.M. 1947, §§ 84-1501 et seq., 84-3514, 84-4901 et seq.

2. **Licenses.**
   Legislature may impose a license tax on certain occupations and not on others, but arbitrary and unreasonable classifications are not permitted.

3. **Taxation.**
The state has the duty and the authority to levy taxes. Const. art. 12, § 11.

4. **Taxation.**
The law does not require that all contractors be taxed in an identical manner but that members of a class be given the same tax treatment. Const. art. 12, § 11.

5. **Taxation.**
Fact that burden imposed on one member of a class may be more onerous than that imposed on a member of another class does not violate constitutional safeguards if classification is justified. Const. art. 12, §11.

6. **Taxation.**
Legislature may make classifications for tax purposes on different industries, and, as long as classification is reasonable, it will be upheld. Const. art. 12, § 11.

7. **Licenses.**
Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within the state, including government is not unconstitutional as being discriminatory in its distinction between public and private contractors, even though private contractors may take many of same precautions required by state or federal government. R.C.M. 1947, §§ 84-1501 et seq., 84-3514, et seq.; Const. art. 12, § 11.

8. **Taxation.**
States have great latitude and freedom to effect tax classifications as long as they are not arbitrary or capricious. Const. art. 12, § 11.

9. **Licenses.**
Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within state, including construction done by United States government is not unconstitutional as being discriminatory against federal government where federal government is treated in same manner as state treats itself and its subdivisions or municipalities. R.C.M. 1947, §§84-1501 et seq., 84-3514, 84-4901 et seq.; Const. art. 12, § 11.

10. **States.**
Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within state including construction done by United States government is not violative of supremacy clause, notwithstanding claim that it results in interference with federal government functions and is in conflict with federal procurement legislation, inasmuch as provisions of Act pertaining to qualifications or competence of public contractors are not applicable to federal contractors. R.C.M. 1947, §§ 84-1501 et seq., 84-3514, 84-4901 et seq.

11. **Licenses.**
Provisions of Public Contractors' License Act which pertain to qualifications or competence of public contractors is not applicable to federal contractors, but qualifications test remains in force in regard to contractors working on state contracts, and gross receipts tax will remain in force as to all public contractors performing work

in state. R.C.M. 1947, §§ 84-1501 et seq., 84-3514, 84-4901 et seq.

12. **Licenses.**
Although a state cannot tax the federal government, it can tax an independent contractor for privilege of doing work within state.

13. **Licenses.**
Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within state, including construction done by United States government is not aimed at nor does it impede federal government in performance of its functions and does not violate immunity of federal government from taxation or economic impact of taxation. R.C.M. 1947, §§ 84-151 et seq., 84-3514, 84-4901 et seq.

Appeal from the District Court of Lewis and Clark County.

First Judicial District.

Hon. Victor H. Fall, Judge presiding.

See **C.J.S.**, Licenses, § 6.

Suit wherein corporate taxpayer challenged constitutionality of Public Contractors' License Act and sought to obtain refund of all taxes and fees remitted to state under Act. The District Court entered judgment in favor of Board of Equalization, and taxpayer appealed. The Supreme Court held that Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within state, including construction done by United States government is not unconsti-

tutional as discriminatory in its distinction between public and private contractors, and it is not unconstitutional as discriminatory against federal government, nor is it violative of supremacy clause, notwithstanding claim that it results in interference with federal government functions and is in conflict with federal procurement legislation, inasmuch as provisions of Act pertaining to qualifications or competence of public contractors do not apply to federal contractors.

Affirmed.

Garlinton, Lohn & Robinson, Sherman V. Lohn and Lawrence F. Daly, argued, Missoula, for plaintiff and appellant.

Scott P. Crampton and Gilbert E. Andrews, Jr., Bruce I. Kogan, argued, Washington, D.C., amicus curiae.

Poore, McKenzie & Roth, Robert A. Poore, argued, Butte, Jene Bell appeared, Helena, for defendants and respondents.

MR. JUSTICE CASTLES delivered the Opinion of the Court.

This is an appeal from a judgment of the district court of the first judicial district, county of Lewis and Clark.

In February and March 1971, plaintiff Peter Kiewit Sons' Co. paid a total of $8,726.47 as gross receipts tax payments in compliance with Chapter 35, Title 84, R.C.M. 1947. At the same time, plaintiff also filed letters of protest with defendant State Board of Equalization challenging the validity of the public contractors' license act and demanded refund of the payments. Within sixty days plaintiff proceeded to bring an action in the district court seeking to have Chapter 35, Title 84, R.C.M. 1947, declared in

violation of the laws and Constitution of the state of Montana and the Constitution of the United States, to obtain refund of all taxes and fees remitted to the state of Montana under the chapter in question.

The district court, sitting without a jury, found the provisions of Chapter 35, Title 84, R.C.M. 1847, did not violate the laws or Constitution of Montana nor the Constitution of the United States. Judgment was entered for defendant. Plaintiff filed motions to amend the findings of fact and conclusions of law and for a new trial, which were denied by the trial court. From the judgment and order denying those motions, plaintiff appeals.

In addition to briefs and argument in this Court by counsel for the parties, a brief and oral argument was presented by the United States government as amicus curiae in support of plaintiff's position.

We feel at this point that a brief history of the Act in question would be helpful. The initial version of what became Chapter 35, Title 84, R.C.M.1947, was passed by the Montana legislature in 1935. It required the licensing by the state of contractors dealing with the state or any of its political subdivisions; federal contractors were excluded from the Act.

In March 1965, in an attempt to ensure the payment of state and local taxes by contractors working in the state, Chapter 277, Laws 1965, was passed by the legislature. The problem arose because some contractors working in the state did not report all of their equipment to county tax assessors, who were attempting to impose county property tax on those contractors. Also, some contractors working in the state would not file corporate or personal income tax returns which would have fairly reflected their business profits from within the state.

Chapter 277, Laws 1965, imposed a 1% tax upon gross receipts of all nonresident public contractors operating within the state. In April 1965, the constitutionality of Chapter 277, Laws of 1965, was raised to this Court and the Court found it to be unreasonable discrimination and ruled it unconstitutional. State ex rel. Schulz-Lindsay v. Board of Equalization, 145 Mont. 380, 403 P.2d 635.

In 1967, the Montana legislature again attempted to work out a solution to the problem of contractors not paying their taxes. That legislature enacted a revenue enforcing measure designed to operate hand in hand with Montana's long-standing personal property tax and income tax, to ensure more effective tax collection and reduce tax avoidance. It then passed an amendment to the 1935 licensing act which required a 1% tax upon all receipts of public contractors in the state, including both resident and nonresident contractors, covering all public works within the state including construction done by the United States government.

The revenue enforcing measure was enacted in an attempt to require some of the contractors working in the state to meet their tax responsibilities. The mechanics of the measure are best understood by taking, as an example, the Kiewit contract for part of the Montana Libby Dam project. The contract was given to Kiewit because it was the lowest responsible bidder. The contractor then entered on the performance of its contract and as the work progressed it received payments from the landowner. It paid 1% of such receipts to the State Board of Equalization. In such manner Kiewit has paid or will pay 1% of approximately 6.4 million dollars or about $64,000 to the State Board of Equalization.

This fund is held to the credit of Kiewit on an accounting system adopted by the State Board. The Act operates in the nature of a withholding or prepayment program for Montana property and income taxes. In this case, Kiewit has sufficient items of heavy equipment working on the job at Libby to incur and pay a personal property tax of $35,803.22. Kiewit is entitled to a dollar for dollar credit and actual refund for such personal property taxes from its fund created with the State Board in 1971 by its payment of the 1% gross receipts tax. So any time in 1971, after having paid the personal property taxes Kiewit could, upon showing proof of such payments of personal property taxes, receive a refund of the payments out of the 1% gross receipts tax. Not only could Kiewit obtain refunds of personal property taxes paid in Lincoln County at the job site, but could also have the same benefits for any personal property taxes paid by it that year, anywhere in Montana.

Payments on the job and the corollary 1% tax thereon may come more rapidly than personal property taxes are due or may exceed the amount of such taxes. In that event, the remainder of the 1% fund to the contractor's credit at the State Board may be used to pay, dollar for dollar, the contractor's income taxes. If refunds of the personal property taxes have not consumed the 1% gross receipts tax payments to the State Board, the contractor can take dollar for dollar credit directly against his tax for the balance of gross receipts tax still remaining to his credit at the State Board.

(1) Where there is heavy equipment subject to property tax and/or net income tax on a job and the taxpayer claims the refunds or credits, the gross receipts tax washes itself out. The Act, as can be seen from the

credits procedure, was intended as an incentive to public contractors to declare their items of personal property for taxation. It also encourages contractors to more fairly allocate out-of-state home office overhead expenses, in part at least, to Montana.

It is true that the Act in practice to date has not resulted in a total washout of the 1% gross receipts payments. It does appear that one of the reasons for this failure is that the federal government has inserted a clause in some of the federal contracts which prohibits a contractor from taking the refunds and credits available to him. Such a clause was in the contract Kiewit had with the federal government Clause 58 (f) of that contract reads:

"The Act (R.C.M. 1947, sec. 84-3514) allows the license fee based on gross receipts to be used as a credit on: (1) the Contractor's corporation license tax (R.C.M. 1947, Title 84, Chapter 15) or on Contractor's income tax (R.C.M. 1947, Title 84, Chapter 49), depending upon the type of tax the Contractor (or sub-contractor) is required to pay under the laws of the State of Montana; and (2) personal property taxes paid in Montana on personal property of the Contractor (or subcontractor) which is used in the business of the Contractor and is located within the State. *The Contractor, and, in turn, the subcontractors will not take advantage of these credits.*" (Emphasis added).

This prohibition by the federal government is of necessity part of the reason there is a surplus of the revenue of the gross receipts tax.

As for other reasons why the Act is not a total wash item, the district court, upon hearing the evidence, found that some of the contractors were not aware of the credit available to them and some were simply

indifferent to the use of their credits. In its finding of fact No. 17, the district court said:

"***That the present residue of tax with the State Board or State of Montana is not fairly representative of how the tax is likely to operate in future years."

There has been nothing presented to this Court on appeal which would change the finding of the district court and it is clear that this Act is intended to operate as a revenue enforcing measure.

Appellant's principal argument is that a tax which is placed solely on public contractors is discriminatory. It maintains the only difference between public contractors and private contractors is the status of the party for whom the contractor is working. Such a difference, in appellant's view, is not sufficient to justify the imposition of the tax.

(2) Since that was the same point raised in *Schulz-Lindsay*, a review of that decision will give us a view of Montana law on the issue of tax discrimination. There, we stated that the legislature may impose a license tax on certain occupations and not on others, as long as "arbitrary and unreasonable classifications" are not permitted. *Schulz-Lindsay p. 398, 403 P.2d, p. 640.*

In *Schulz-Lindsay* at p. 390, 403 P.2d at p. 640, the Court citing State v. Sunburst Refining Co., 73 Mont. 68, 235 P. 428, stated that in making such classifications:

"'Equal protection of the law is seldom, if ever, obtained; and because of the very frailty of human agencies, the authorities all recognize the right of the legislative branch of government to make reasonable classifications of subjects, for property or occupation taxes***and if the classification is reasonable, and if all of the subjects within a given class are accorded

the same treatment, the legislation cannot be said to deny to anyone within such class the equal protection of the law, even though the burden imposed upon him may be more onerous than that imposed upon a member of another class. (citing cases) *But to justify such discriminatory legislation, and avoid the condemnation of the Fourteenth Amendment to the federal Constitution, the classification must be reasonable—that is, must be based upon substantial distinctions which really make one class different from another.* (Citing case) (Emphasis ours.)'"

Later in the same opinion at p. 392, 403 P.2d at p. 641, the Court said:

"'The constitutional safeguard against unjust discrimination in legislation of this type is well defined by the decisions everywhere, and that is, *that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* Mills v. State Board of Equalization, 97 Mont. 13, 31, 33 P.2d 563.' (Emphasis ours.)"

(3.) The state has the duty and authority to levy taxes. Such is required in the Constitution; however, Section 11 of Art.XII of the Montana Constitution requires that such taxes shall also be uniform upon the class within the taxing authority. Interpreting that section of the Montana Constitution in Schultx-Lindsay at p. 393, 403 P.2d at p. 641, this Court said:

"'"Or, stating the principle of sections 1 and 11 in different form, the mandatory injunction to the Legislature is that it shall prescribe such uniform mode of *assessment* as shall secure a just valuation of all taxable property, that all taxes shall be levied and

collected by general laws and for public purposes only, and that *they shall be uniform upon the same class property within the territorial limits of the authority levying the tax. This is the rule of uniformity declared by Constitution, if we are able to determine the intention of its framers aright.*"

"'*We think it will be admitted that any tax against the same kind of property used for identical purposes is not uniform when a different valuation and a different rate is applied to two distinct taxpayers, separately distinguishable only in name,* and the tax being imposed by the same taxing district. We further believe it will be admitted that such disregard of the uniform clause of sections 1 and 11 of Article XII, supra, constitutes clear discrimination.'" (Emphasis theirs).

(4) In *Shultz-Lindsay* it is clear the state had discriminated against nonresident taxpayers doing public work. All contractors doing public work were not treated in a fair manner as there was no basis to make the distinction between resident and nonresident public contractors. That is not the situation here, because all public contractors are not treated equally, all are taxed on 1% of their gross receipts. There is a class of taxpayers, public contractors, and that class comes under the special tax enforcing measure of the Act. This situation is clearly distinguishable from the *Schultz-Lindsay* situation. We do not read the law to require all contractors to be taxed in an identical manner, only that members of a class be given the same tax treatment.

(5) It is true that the private contractor does not have the same revenue enforcing measure that the public contractor has, but, "even though the burden imposed upon him may be more onerous than that

imposed upon a member of another class", that does not violate the constitutional safeguards if the classification is justified. *Schultz-Lindsay,* p. 390, 403 P.2d p. 640.

(6) Montana case law has established that the legislature may make classifications for tax purposes on different industries in Montana. As long as the classification is reasonable, it will be upheld. Quong Wing v. Kirkendall, 39 Mont. 64, 101 P. 250; Anaconda Copper Mining Co. v. Junod, 71 Mont. 132, 277 P. 1001; Hale v. County Treasurer of Mineral Co., 82 Mont. 98, 265 P. 6; Norum v. Ohio Oil Co., 83 Mont. 353, 272 P. 534.

(7) Our question now is—is it reasonable to make a classification for tax purposes for contractors doing public work and not for contractors doing private work?

At trial, respondent State Board stressed the differences between the two types of contractors in this manner:

1. A public work is intended for the use of the public and if the work is inadequate in some particular way, this could expose and would expose some part of the public at large to danger, inconvenience, or injustice. That of course would not be always true in the case of a private contractor.

2. Public contractors must be experienced, they must establish their qualifications to the state or federal government. However, private property owners could engage a licensed or unlicensed contractor or an experienced or inexperienced one.

3. Public contractors invariably must provide a bond. Private works require bonds only at the election of the owner.

4. Public works normally would involve elaborate,

professionally drawn plans and specifications. They would also include mandatory supervision or inspection. Private works would have such inspection and/or supervision at the option of the owner.

Appellant argues that all of the above mentioned areas are also normally included in any private contracting job in the state; therefore, there is no justification of the classification. We do not agree. It may be true that private contractors will take many of the same percautions required by the state or federal government, but the point is that when dealing with public works these precautions *must* be taken. People of the state have a right to make sure that a building built with their money is safe and that the contractor is qualified in all respects. For this reason it is clear how the classification can be made—for the protection of the public good. The duty of a contractor is to the person paying the bill, in the case of a public contractor it is the taxpayer. In order to ensure that the duty is met, the state can and does deal with public contractors in a different way than private contractors. Because of this basic difference, there is no reason why they cannot be taxed in a different manner, as long as all in the same class are treated equally.

In Quong Wing v. Kirkendall, 39 Mont. 64, 69, 101 P. 250, 251, the Court said:

"The Constitution gives the power to impose a license tax upon persons doing business in this state.***The Legislature is not required to tax all occupations equally or uniformly.***'If the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law "operates equally and uniformly upon all persons in similar circumstances.'"'

What could be more uniform than requiring all public contractors to pay this tax, all members of the class are treated alike.

(8 The United States Supreme Court has given the states great latitude and freedom to effect tax classifications, as long as they are not arbitrary or capricious. In Brown-Forman Co. v. Kentucky, 217 U.S. 563, 30 S.Ct. 578, 54 L.Ed. 883, 887, the state of Kentucky levied a 1¼ cent per gallon tax on every corporation or individual engaged in the business of compounding, rectifying, adulterating or blending distilled spirits. Corporate or individual distillers of pure or unadulterated spirits were not so taxed. A producer of blended spirits brought an action stating the tax was discriminatory. In upholding the state's power to tax, the United States Supreme Court said:

"A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

We believe that a distinction between public and private contractors is not arbitrary or capricious and following the reasoning of the United States Supreme Court—the state of Montana has the power to make such a distinction and the statute in question is not unconstitutional

The second half of the discrimination question raised by appellant is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United

States and other public bodies as well as it treats private nongovernmental parties. Appellant contends granting a preferred tax status to a substantial number of taxpayers, contractors performing work for private owners, and failing to grant a comparable status to construction contractors of the United States, constitutes unconstitutional discrimination agaist the United States and those who whom it deals.

In response to this argument, respondent Board contends, basically, that since the state of Montana is treated in tax matters with public contractors the same as the federal government is treated, there is no discrimination. Counsel for both parties cite in support Phillips Chemical Co. v. Dumas School District, 361 U.S. 376, 80 S. Ct. 474, 4 L.Ed. 2d 384, 391, and Moses Lake Homes v. Grant County, 365 U.S. 744, 81 S. Ct. 870, 6 L.Ed2d 66.

In *Phillips Chemical Co.*, the state of Texas levied a tax on leases where the United States government was the lessor, but did not provide for such a tax where the state of Texas was the lessor. The court found this type of taxation was discriminating against the federal government and therefore invalid. The court stated:

"****it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself."

In *Moses Lake Homes,* the state of Washington sought to tax leasehold interests wherein the federal government was the lessor at a higher rate than it taxed leasehold interests where the state of Washington was the lessor. The court stated that *Moses Lake Homes* was indistinguishable from *Phillips Chemical Co.* and ruled that a tax which

discriminated against the federal government was invalid.

(9) Here, we do not believe that the state of Montana has discriminated against the federal government. The federal government is being treated in the same manner as the state of Montana treats itself and its subdivisions or municipalities. The only discrimination the federal government can claim is that private contractors are not paying the same tax as public contracators. However, according to case law, all the United States Supreme Court has required is that the state does not give itself special treatment over that received by the federal government. The Act involved here treats the federal government in the same manner as it treats those who deal with any part of the state government. The second half of the discrimination question is denied.

(10) Appellant and amicus curiae argue that the Act is invalid because it results in interference with federal government functions and is in conflict with federal procurement legislation. Therefore, it violates the supremacy clause of the United States Constitution. Their basis for such argument is that our licensing statutes gives Montana the power of review as to whether or not a contractor can operate within Montana, even if he has already been awarded a public contract.

All parties cite Miller v. Arkansas, 352 U.S. 187, 77 S. Ct. 257,1 L.Ed 2d 231. There, Arkansas had a licensing statute similar to the one in question here which allowed the state to review contractors who had been awarded public contracts, including federal contracts, as to their fitness to perform the work. Under the authority of that statute, the state brought an action against a contractor awarded a federal

contract because that contractor was not licensed in Arkansas. In reviewing the case, the United States Supreme Court held simply that the statute was not applicable to contractors working on federal government contracts. We do not find the United Sstates Supreme Court stated that such Arkansas statute was unconstitutional per se. If only stated that the state does not have the power to review federal contractors as to their fitness.

11) Here, we hold, as did the district court, that the provisions of the Act which pertain to qualifications or competence of public contractors is not applicable to federal contractors. The qualification test of the Act remains in force in regard to contraactors working on state contracts, and the gross receipts tax will remain in force as to all public contractors performing work in Montana.

(12) Finally, it is argued that this Act violates the immunity of the federal government from taxation or the economic impact of taxation. It has been established that a state cannot tax the federal government. But, the state can tax an independent contractor for the privilege of doing work within the state. The United States Supreme Court decided that point in James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 166, 173.

In *James,* the plaintiff was a contractor domiciled in Pennsylvania. As an independent contractor it had four construction contracts with the federal government for the building of locks and dams in the Kanawha River and Ohio River within the state of West Virginia. West Virginia had a statute known as the gross sales and income tax law which provided for annual and privilege taxes on contractors doing business in the state of West Virginia. The tax was

2% of the gross income of the contractor within the state. Such tax was in addition to all other state taxes. The court was faced with this problem: "Is the tax invalid upon the ground that it lays a direct burden upon the federal government?" To that question the court answered:

"***the West Virginia tax *** does not interfere in any substantial way with the performance of the federal functions and is a valid exaction."

The court then went on to point out that the economic impact upon the federal government must be direct and substantial and that the 2% gross tax was neither direct nor substantial. For a further discussion of this rationale, see Silas Mason Co. v. State Tax Commission, 188 Wash. 98, 61 P.2d 1269.

(13) Following the reasoning of the United States Supreme Court, we find the tax involved here was not aimed at nor does it impede the federal government in performing its functions. If there is any burden on the federal government, it is indirect and not substantial. The tax is valid.

The judgment of the district court is affirmed.

MR. CHIEF JUSTICE JAMES T. HARRISON, and MR. JUSTICES HASWELL, DALY and JOHN C. HARRISON concur.

PETER KIEWIT SONS' CO., A Corporation,
Plaintiff and Appellant,
v.
DEPARTMENT OF REVENUE et al.,
Defendants and Respondents.
No. 12754.
Supreme Court of Montana.
Submitted Sept. 11, 1974.
Decided Feb. 21, 1975.

Public contractor brought action against Department of Revenue and Tax Appeal Board challenging constitutionality of public contractors' gross receipts tax. The District Court, Lewis and Clark County, Peter G. Meloy, J., granted summary judgment in favor of Department of Revenue and Tax Appeal Board and public contractor appealed. The Supreme Court, Castles, J., held that problems in administration of a tax did not make the statute creating it unconstitutional; that constitutionality of the statute was not contingent on refunds of personal property taxes and contractors' income taxes offsetting the gross receipts tax; and that prior decision of the Supreme Court involving the same challenge to the same statute by the same public contractor was res judicata.

Affirmed.

1. Licenses 7(1)

Any problems arising out of method by which Department of Revenue currently enforced entire public contractors' gross receipts tax law with respect to both public and private contractors was strictly an administrative problem and did not approach a constitutional problem such as would invalidate the statute which created the tax.
R.C.M.1947,§84—3501 et seq.

2. Licenses 5

Any interference with federal highway administration procurement activities caused by enforcement by Department of Revenue of public contractors' gross receipts tax did not make the tax law unconstitutional. R.C.M.1947, § 84—3501 et seq.

3. Licenses 7(1)

Although allegation that state collected money through the public contractors' gross receipts tax in excess of credits and refunds and was thus using the law as a revenue raising measure rather than a revenue enforcing measure might give public contractor a right to refund or some other administrative remedy, it did not provide basis for declaring the law unconstitutional. R.C.M.1947, § 84—3501 et seq.

4. Courts 107

State Supreme Court decision which upheld constitutionality of public contractors' gross receipts tax did not make the constitutionality of the statute contingent upon its being enforced in such a manner that refunds of personal property taxes and contractors' income taxes offset the 1% gross receipts tax. R.C.M.1947, § 84—3501 et seq.

5. Judgment 585(2)

Decision of state Supreme Court which upheld public contractors' gross receipts tax in challenge brought by public contractor against State Board of Equalization was res judicata to constitutional challenge brought by the same public contractor against the Tax Appeal Board and Department of

Revenue some six months later. R.C.M.1947, § 84—3501 et seq.

Garlington, Lohn & Robinson, Lawrence F. Daly (argued), Sherman V. Lohn (argued), Missoula, for appellant.

Terrence B. Cosgrove (argued), Helena, Poore, McKenzie & Roth, Robert A. Poore (argued), Butte, for respondents.

CASTLES, Justice.

This is an appeal by plaintiff from a summary judgment for defendant granted after a hearing.

On January 10, 1973, this Court decided cause No. 12199, Peter Kiewit Sons' Co. v. State Board of Equalization, et al., 161 Mont. 140, 505 P.2d 102, where we upheld the validity of Chapter 35, Title 84, R.C.M.1947, as amended.

On July 18, 1973, plaintiff-appellant, hereinafter referred to as Kiewit, filed a complaint in Lewis and Clark County district court, identical to the complaint in cause No. 12199, differing only in amounts of taxes paid at different times. Kiewit sought a recovery of taxes paid and a declaration of unconstitutionality of CHAP. 35, Title 84, R.C.M. 1947, AS AMENDED.

Defendants-respondents, hereinafter referred to as the Department of Revenue, moved to dismiss the complaint on the grounds of *res adjudicata,* in that the original Kiewit case controlled. The motion to dismiss was later graduated under Rule 12 (b), M.R.Civ. P., to a motion for summary judgment.

Kiewit's position is that this Court declared the law to be valid only if enforced in a certain manner. Then,

Kiewit reasons, six months later, in July of 1973, it would demonstrate that the law was invalid because the manner of enforcement did not follow guidelines laid out by this Court. Kiewit engages in a rather tortuous reasoning: The decision of this Court in upholding the validity of the public contractors' gross receipts tax was conditional. These conditions were, according to Kiewit, (1) that public contractors were exempt from competency requirements of the Act, and (2) that the law could not result in revenue being raised.

Then Kiewit argues: (1) The Department of Revenue currently enforces the entire law against public and private contractors alike and (2) the state collects money in excess of credits and refunds and thus instead of being a revenue enforcing measure, it is actually a revenue raising measure.

(1,2) As to Kiewit's first contention, if there be a problem it is strictly an administrative one and does not, in our view, approach a constitutional problem. Kiewit charges there has been interference with federal highway administration procurement activities. This may be so, but we are unable to see where a federal-state conflict at the administrative level makes a state law unconstitutional.

(3) As to Kiewit's second point, it may be that Kiewit would be entitled to a refund or some other administrative remedy, but it is obvious that Kiewit seeks but one thing—a declaration of unconstitutionalilty. Judge Meloy found the original Kiewit decision res adjudicata on the issue of constitutionality and we affirm.

(4) Kiewit insists that the only basis for this Court's conclusion that the Act was not discrimina-

tory as to public contractors was that if the Act were properly enforced, it would result in a "washout"; that is, refunds of personal property taxes and contractors' income taxes would offset the 1% gross receipts tax. Kiewit reads our opinion much too narrowly. We held there that a reasonable classification for tax purposes lay between private and public contractors.

The original Kiewit case involved proceeds from an Army Corps of Engineers contract dated October 9, 1970. At that time, as pointed out in the original Kiewit opinion, provision #58 (f) prohibited the contractor from taking advantage of credits available under the provisions of section 84—3514, R.C.M. 1947. Because of that provision and because of ignorance and indifference, many contractors were not applying for credits they were entitled to. The Army Corps of Engineers contract dated May 28, 1971, had a similar provision, #66, which prohibited contractors from taking advantage of credits. However, on December 15, 1971, the Corps notified Kiewit to obtain all refunds and credits available under the Montana law and to ignore general provision #66. So, now, Kiewit is seeking all credits and refunds. The instant case concerns gross receipts taxes paid over and above any credits and refunds.

Kiewit cites State ex rel. Schultz-Lindsay Construction Company v. State Board of Equalization, 145 Mont. 380, 403 P.2d 635, for the proposition that a gross receipts tax on nonresident contractors is arbitrary and unreasonable. In the original Kiewit case we discussed *Schultz-Lindsay* and distinguished it and we will not repeat the discussion here.

In Garrett Freightlines, Inc. v. Montana Railroad and Public Service Comm'n, 161 Mont. 482, 491, 507

P.2d 1040, 1045, decided March 15, 1973, just two months after the original Kiewit case, this Court in a 3 to 2 decision held a statute, assessing .575 of 1 percent of gross operating revenue on licensed public carriers while exempting directly competing private carriers and exempt carriers, to be unconstitutionally arbitrary and discriminatory. There the Court said:

"All this goes to show the vast difference in fact situation here from that in Peter Kiewit Sons' Co. v. State Board of Equalization, 161 Mont. 140, 505 P.2d 102. In that case a complaint was raised as to the public contractors' license act being unconstitutional because the levy was not uniform and was discriminatory. We there held that since it appeared that all public contractors had to pay the tax, that all members of the class were treated alike. Under the facts there we also held that a distinction between public and private contractors was not arbitrary and capricious; it being clear from the record that the public contractors' license act was intended to operate as a revenue enforcing measure as pointed out in the opinion and a like situation did not appear as to private contractors."

In *Garrett* the unfairness of the tax as between *competing* businesses was shown. In the instant case there is no unfairness as between competing contractors. All public contractors are treated alike.

(5) We have discussed the position of Kiewit on the merits. The original Kiewit decision is res adjudicata since the parties, issues, and facts are all the same in their relevant particulars. The trial court concluded that the only factual differences were inconsequential against the impact of the doctrices of res adjudicata, collateral estoppel or stare decisis. We agree

We affirm the judgment of the district court.

JAMES T. HARRISON, C.J., and JOHN C. HARRISON HASWELL and DALY, J.J., concur.

Supreme Court, U. S.
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In the Supreme Court of the United States

No. 77-1134

UNITED STATES OF AMERICA,
Appellee,

vs.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W. A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,
Appellants.

Brief of the State of California as Amicus Curiae

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INTEREST OF AMICUS CURIAE

The State of California shares a common concern with the State of Montana that federal decisional law impacting upon the rights of the several states to impose state taxes of various types upon persons dealing with the federal government be consistent and workable. While California does not have a state statute comparable to the Montana Contractors' Gross Receipts Tax (Chapter 35, Title 84,

Revised Codes of Montana (1947)) before the Court in this case, it does impose various forms of state taxation upon persons dealing with governmental entities. The language of the opinion below, if interpreted to be of general application, could in theory be regarded as inconsistent with the imposition of any state taxes on persons dealing with the federal government. Such an application of this language would be at odds with the settled principles laid down by this court and could encourage needless litigation.

This brief being filed by the State of California Attorney General, consent to its filing is not required. United States Supreme Court Rule 42(4).

OPINION BELOW

The opinion of the three-judge district court for the District of Montana, Helena Division, is reported below at 437 F.Supp. 354 (1977).

ARGUMENT

The Court below held that the Montana Contractors' Gross Receipts Tax levied upon independent contractors performing work for the State of Montana, its subdivisions and the United States government violated the Supremacy Clause, noting that the tax discriminated against the federal government vis a vis the Montana State government insofar as Montana received as general revenue the tax collected after allowing refunds and credits whereas the federal government did not. The Court thus reasoned:

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G. R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G. R. Tax as a line item in his bid and thus increase

> the cost of construction, the State would receive as general revenue that portion of the G. R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50% of the G. R. Tax. Contra, the government is required to pay through increased bids by the imposition of the G. R. Tax and gets no return of the overplus of approximately 50%."

In support of its finding, the district court relied upon *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed. 384 (1960) as cited in *Homestake-Sapin Partners v. United States*, 375 F.2d 507 (10th Cir. 1967), in support of the proposition that because the tax levied on contractors performing public work generated tax revenue for the state and not the federal government, the federal government was discriminated against. The District Court clearly misread and misapplied the *Phillips Chemical* rule and tested for equality of economic tax impact at the level of the sovereigns rather than at the level of those who deal with the sovereigns, i.e., the contractors. This position is directly contrary to the previously established law in this area.

Beginning with the case of *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), this Court upheld as being constitutional, a "2 percent" tax imposed by a state upon the gross receipts of a contractor earned under with the federal government. See also *Silas Mason Co. v. Tax Commission of Washington*, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187 (1937), upholding the validity of an occupation tax applied to gross income received by individuals performing work for the federal government; *United States v. Boyd*, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed. 2d 713 (1964), upholding a tax levied by the state of Tennessee on property owned by the federal government, but

used by independent contractors in the performance of federal contracts; *Alabama v. King and Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941) upholding the validity of a sales tax levied upon contractors operating under a "cost plus fixed fee" contract with the federal government; *United States v. Detroit*, 355 U.S. 466, 78 S.Ct. 474, L.Ed.2d 424 (1958) upholding the validity of a state tax levied on property owned by the federal government but leased to an independent contractor.

> "At the same time it is well settled that the government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the government." *Detroit, supra*, p. 469.

The cases made it clear for a tax to be valid, it must (i) not have substantial economic impact on the federal government; (ii) not be levied directly on the federal government; and (iii) not be discriminatory. A review of the tax levied by the State of Montana indicates that it falls within these guidelines. It is a tax one-fourth as large as the tax levied in *Dravo* (½ of 1 percent as opposed to 2 percent); it is not direct, it is levied upon all contractors performing work for any public body—including the State of Montana and its subdivisions.[1]

The defect of the language of the majority opinion below was aptly described in the dissent of Judge Kilkenny as follows:

> "The reasoning of the majority *sub silentio* overrules this (Dravo) and other authority. In each of the

1. Compare the discrimination condemned in the *Phillips Chemical* case, where property leased from the federal government was taxed at full value whereas similar leases of state owned property was not taxed at all. 361 U.S. at 387.

> above cases, the tax would apply equally to those doing work for the state government. Applying the reasoning of the majority, there is discrimination against the federal government because the otherwise legitimately collected tax (general state revenue) reduces the state's net cost, thereby allowing it to spend less than the federal government. Thus, under the guise of discrimination against the federal government, *any state tax could be traced backwards to defeat its own existence.*" (Emphasis added)

CONCLUSION

In light of the foregoing, it is respectfully requested that this Court note probable jurisdiction in the present case to remove the ambiguity contained in the language of the opinion below and consider all other issues raised in Appellants' Jurisdictional Statement.

Dated: March 14, 1975

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAR 16 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1977

No. 77-1134

UNITED STATES OF AMERICA,

Appellee,

vs.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W. A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

On Appeal From the United States District Court for the District of Montana

Brief of the States and Territories of Virginia, Arizona, North Dakota, Alaska, Nebraska, Maryland, Hawaii, Nevada, Oregon, Alabama, Wyoming, Guam, Washington, Arkansas, Florida, West Virginia, Iowa, Idaho, New Mexico, Indiana, Puerto Rico, and Colorado as Amici Curiae in Support of Appellant's Jurisdictional Statement.

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In the Supreme Court
of the United States

OCTOBER TERM, 1977

No. 77-1134

UNITED STATES OF AMERICA,

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STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W. A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

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Brief of the States and Territories of Virginia, Arizona, North Dakota, Alaska, Nebraska, Maryland, Hawaii, Nevada, Oregon, Alabama, Wyoming, Guam, Washington, Arkansas, Florida, West Virginia, Iowa, Idaho, New Mexico, Indiana, Puerto Rico, and Colorado as Amici Curiae in Support of Appellant's Jurisdictional Statement.

I.

INTRODUCTORY STATEMENT

This brief is submitted by the signatory states as Amici Curiae in support of the Jurisdictional Statement in the above captioned case. This brief being sponsored and

filed by the aforementioned states; consent to its filing is not required. United States Supreme Court Rule 42(4).

II.
OPINIONS BELOW

The opinion of the 3-judge District Court for the District of Montana, Helena Division, is reported at 437 F. Supp. 354 (1977). Copies of that opinion, and the unreported opinion entered by said court on November 18, 1974, are appended to Appellants' Jurisdictional Statement as Appendix p. 5-35, and p. 65-75.

III.
INTEREST OF AMICI CURIAE

The interests of the states joined as Amici in this brief, revolve around what is believed to be the far reaching effects of this opinion as it relates to the question of state taxation of independent contractors performing work for the United States of America, (federal government).

The finding of the District Court majority, viz., that a constitutional infirmity exists in a tax levied upon independent contractors performing work for the federal government, because said tax generates income for the taxing state, clearly has serious consequences for states other than Montana. As the argument contained herein will demonstrate, such a position is not consistent with the previous decisions of this Court.

It is essential that this Court accept jurisdiction of this cause, and reaffirm constitutional standards previously established, so as to allow the legitimate and continued state taxation of independent contractors performing work for the federal government.

IV.
ARGUMENT

Several issues are raised in Appellants' Jurisdictional Statement which contain merit and which warrant this Court's review of this decision. However, of the issues raised, one is of singular importance not only to the State of Montana, but contains national implications of great importance to the Amici states as well. Therefore, this brief is limited solely to a discussion of that question.

THE ACT DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The tax in question is known as the Montana Contractors' Gross Receipts Tax, and is found in Chapter 35, Title 84, Revised Codes of Montana (1947). Basically, the tax is a levy of one percent of the gross receipts earned by public contractors within the State of Montana. The tax is levied on the contractor and not on the public agency. A public contractor is defined as any person performing a contract for the State of Montana or any other public body, including the federal government. The Act provides for a system of refunds and credits, whereby a contractor can receive a cash refund for personal property taxes, or a credit for any corporate income taxes. The tax is levied on all public contractors and makes no distinction, as to the state of incorporation or principal place of business. During the years of the operation of the tax, it has resulted in revenue being generated for the State of Montana equal to one-half of the amount of the tax collected — i.e. effective tax of ½ percent. [1]

[1] The Act has been questioned in the Supreme Court of the State of Montana on two different occasions by the federal government, acting through its contractor Peter Kiewit & Sons, Inc. For a discussion of the history of the Act and the legislative intent, *see Peter Kiewit & Sons Co. vs. State Board of Equalization*, 161 Mont. 140, 505 P.2d 102 (1973) and *Peter Kiewit & Sons Co. vs. Dept. of Revenue*, 166 Mont. 260, 531 P.2d 1327 (1975).

Several issues were raised by the federal government to support its contention regarding the invalidity of the tax. What will be discussed by the Amici in this brief, are the allegations, labeled as Supremacy Clause questions, that the Act discriminates against the government, its agencies and instrumentalities, and those with whom it deals. (Appellants' Appendix, page 92-94)

The district court, in finding that the Act violated the Supremacy Clause, based its decision on the fact that the state retained as general revenue one-half of one percent of the amount of the tax collected. The Court stated:

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G. R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G. R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G. R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G. R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G. R. Tax and gets no return of the over plus of approximately 50 percent." (Appellants' Appendix, page 13.)

In support of its finding, the district court quoted from *Homestake-Sapin Partners vs. United States*, 375 F.2d 507, (10th Cir. 1967) citing from *Phillips Chemical Co. vs. Dumas Independent School District*, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed. 384 (1960), reiterating the well established doctrine, that a state must treat those who deal with the government as well as it treats those who deal with itself.

The district court found that because the tax levied on contractors performing public work generated tax revenue for the state and not the federal government, Montana was not complying with the "Golden Rule" of *Phillips Chemical*. The district court clearly misread and misapplied the *Phillips Chemical* rule and tested for equality of economic tax impact at the level of the sovereigns rather than at the level of those who deal with the sovereigns — i.e. the contractors. It is that crucial, fundamental and erroneous holding of this case which is so very disturbing to the Amici. This position is directly contrary to the previously established law in this area.

Beginning with the case of *James vs. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, (1937), this Court upheld as being constitutional a "2%" tax imposed by a state upon the gross receipts of a contractor earned under contracts with the federal government. *See also, Silas Mason Co. vs. Tax Commission of Washington*, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187 (1937), upholding the validity of an occupation tax applied to gross income received by individuals performing work for the federal government; *United States vs. Boyd*, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed. 2d 713 (1964), upholding a tax levied by the State of Tennessee on property owned by the federal government, but used by independent contractors in the performance of federal contracts; *Alabama vs. King and Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941) upholding the validity of a sales tax levied upon contractors operating under a "cost plus a fixed fee" contract with the federal government;[2] *United States vs. City of Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed. 2d 424 (1958), upholding the validity of a state tax levied on

[2] See also *U.S.A. and Hercules Inc. v. Forst*, ___ F.2d ___, (4th Cir. 1978), Case No. 77-1395 and 77-1722, decided January 23, 1978.

the lessee of property owned by the federal government. As stated in *United States vs. City of Detroit*, *supra*, at 469:

> "At the same time it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the government."

The cases make it clear that in order for a tax to be valid, it must (i) not have substantial economic impact on the federal government, (ii) not be levied directly on the federal government; and (iii) not be discriminatory. A review of the tax levied by the State of Montana herein indicates that it falls within these guidelines. It is a tax ¼ as large as the tax levied in the *Dravo* case, *supra* (½ of 1% as opposed to 2%); it is not direct as it is levied on the independent contractors and not on the federal government; and finally, it is not discriminatory as it is levied upon all contractors performing work for any public body, including the State of Montana and all counties, cities and special improvement districts, etc.

Yet the district court found this tax to be invalid on the grounds of discrimination, finding the state was not treating those who deal with the federal government as well as it treats those who deal with itself. (Appellants' Appendix, page 13.) The majority cited the case of *Phillips Chemical Co. vs. Dumas Independent School District*, *supra*, at 385, and the following test:

> "Accordingly, it does not seem too much to require that the state treat those who deal with the (federal government) as well as it treats those with whom it deals itself."

It is the position of the Amici that the district court has misapplied this "Golden Rule" test for discrimination. This tax is levied on all public contractors performing work for both the State of Montana (and its inferior governments) and the federal government. However, the district court found that because the tax generated revenue for the State of Montana and because this revenue is retained by the state, this results in discrimination under the Supremacy Clause. The fallacy of the argument lies in the fact that there is no way any state tax levied upon independent contractors performing work for the federal government could therefore be upheld.

Take for example the situation in the *Dravo* case, *supra*. In that instance, West Virginia levied a 2% tax on all contractors performing work in the state whether working for the State of West Virginia or the federal government. Under the reasoning of the majority opinion herein, a project costing $100,000 would in reality cost the State of West Virginia $98,000 (total cost minus 2% tax) or $2,000 less than the $100,000 project would cost the federal government. By following the majority's opinion that tax would be invalid under the Supremacy Clause, because the state retained as revenue the tax collected. Such a result cannot be allowed to stand.

Montana has treated all contractors dealing with public bodies in the same way, levying a tax on their gross receipts. A contractor performing work for the State of Montana (or any of its inferior governments), as opposed to a contractor performing work for the federal government, has been given no advantage. Rather, the "discrimination" that the majority opinion speaks of relates to the fact that the tax generated reduces the cost the state government ultimately has to pay. The test set

forth in the *Phillips Chemical* case, *supra*, does not make invalid a state tax levied on contractors performing work for the federal government merely because the monies end up in the coffers of the state treasury. Rather, it requires that if a tax is to be levied on a federal contractor, a like and equal tax must be levied on a state contractor.

The Amici are not alone in believing that the majority has misconstrued the *Phillips* test, and that if the opinion were left to stand, it could have a far reaching effect on the issue of inter-sovereign taxation. This thought was expressed very aptly by Judge Kilkenny in his dissent.

> "The reasoning of the majority *sub silentio* overrules this (Dravo) and other authority. In each of the above cases, the tax would apply equally to those doing work for the state government. Applying the reasoning of the majority, there is discrimination against the federal government because the otherwise legitimately collected tax (general state revenue) reduces the state's net cost, thereby allowing it to spend less than the federal government. Thus, under the guise of discrimination against the federal government, *any state tax could be traced backwards to defeat its own existence.* (Appellants' Appendix, page 28-29.)" (Emphasis added).

The Amici would also point out to the court the serious error the majority made in finding that the act also violated the Supremacy Clause because it discriminated against the government in favor of private contractors. (Appellants' Appendix page 15). What the majority did was use only Supremacy Clause standards in deciding a tax classification issue.

As the Jurisdictional Statement of the State of Montana indicates, it is necessary to also use Equal Protection rules when deciding tax classification questions. The tax in this case makes a distinction between public and

private contractors. The Montana Supreme Court in Kiewit No. 1, (Appendix page 105-123) found such a tax classification valid under the generally used Equal Protection standards. The Montana Supreme Court then went on to decide that the act did not violate the Supremacy Clause rules because it treated the State of Montana in the same way as the federal government.

What the majority has done in this case is to insert the United States into the status of a taxpayer, and then find under the Supremacy Clause that the government was not being treated as well as private contractors and rule the tax invalid. Initially, the government is not a taxpayer under the act, and it was incorrect for the majority to so hold. Also, such reasoning would invalidate any state tax, because whenever the government is looked on as a taxpayer, Supremacy Clause standards allow no other results anytime there is any classification between taxpayers.

A review of the recent opinion of this Court, *United States v. County of Fresno*, __ U.S. __, 97 S.Ct. __, 50 L.Ed. 2d 683, (1977) supports our position. The *Fresno* case involved the question of whether or not a state could levy a tax on employees of the federal government measured by the value of their possessorary interest in housing owned and supplied to them by the federal government. In holding the tax valid, this Court again reiterated the rule that taxes levied on those who deal with the federal government are valid as long as the tax is also imposed on similarly situated constituents of the state.

Here, the tax is levied on all similarly situated constituents, all the contractors doing work for any public agency. In making the determination of whether or not the tax classification is valid, it must be tested under the

traditional Equal Protection standards, as discussed in *Allied Stores v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed. 2d 480 (1959), and not by Supremacy Clause standards alone. To allow the opinion of the majority to stand, which equates the federal government to the status of a taxpayer, will render all such state taxes invalid under Supremacy Clause reasoning.

CONCLUSION

This issue is of vital concern to the Amici and represents a question having nationwide impact in the field of inter-sovereign taxation. Therefore, we urge this Court to note probable jurisdiction in the present case and give plenary consideration to this and all other issues presented in Appellants' Jurisdictional Statement.

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1134

UNITED STATES OF AMERICA

Appellee

—v.—

STATE of Montana; Department of Revenue of THE STATE of Montana; and W. A. Groff, Director of Revenue of and for the State of Montana, and his successors in office.

Appellants

On Appeal From the United States District Court for the District of Montana

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Docketed February 13, 1978
Probable Jurisdiction Noted May 22, 1978

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2	Motion for Preliminary Injunction
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4	Memorandum of law in support of plaintiff's motion for preliminary injunction
5	Request for Three Judge Court
6	Certificate & Request for Three-Judge Court
7	Summons (served)
8	Order designating Hon. James R. Browning, Hon. Russell E. Smith and Hon. William G. East to determine Cause
9	ANSWER OF DEFENDANTS
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21 Notice of entry of final judgment by Supreme Court of the State of Montana; Motions to dismiss federal district court action and to release all gross receipts tax funds from sequestration; Citations of Authorities

22 Government's Memorandum in opposition to defendants' Motions

23 Amended Stipulation with ORDER thereon for continuance without date

24 Deft's Renewal of Pending Motion to Dismiss & Motion to Abate Order for continuance

25 Government's Memorandum of Points & Authorities in opposition to defts' Motion to Dismiss

26 Motion & Order granting defts to and including Nov. 30, 1973 to file a Reply brief

27 Order setting hearing on Mot. to Dismiss on Jan. 21, 1974 at 10:00 AM

28 Reply Brief of Defendants in Support of their pending Motion to Dismiss

29 Motions for leave to specify additional ground for granting defts. pending motion to dismiss etc.

30 Notice of hearing motions

31 Affidavit of Robert A. Poore in support of motion to dismiss

32 Affidavits of Contractors performing construction work in the State of Montana for the United States

33 Order setting of hearing on defts' Motion to Dismiss is vacated; pltff shall within 30 days file & serve a brief devoted to the problems of res judicata & collateral estoppel. Defts. shall have 20 days to reply. All motions to dismiss and for summary judgment will be then deemed submitted

34 Government's Cross-Motion for Summary Judgment, cert. of serv.

Date	No.	Document
2-21-74	35	Plaintiff's Memorandum of Law (1) In further opposition to defendants' Motion to Dismiss, (2) in opposition to defendants' Motion to Dismiss, (2) in opposition to defendants' Motion for Summary Judgment based on *Res* Judicata or collateral estoppel, and (3) in support of its cross-motion for summ. Judgment
2-21-74	36	Affidavit of Sherman V. Lohn, Cert. of service attached to plaintiff's memorandum No. 35
2-20-74	37	Defendant's Second Reply Brief as directed & authorized by Court's Order of Jan. 16, 1974, certif. of service
3-14-74	38	Stipulation for ext. of time to file briefs of Deft. until April 1, 1974
3-14-74	39	Motion for Additional time to file brief to April 1, 1974
3-14-74	40	Cert. of Mailing on Mot. for additional time to file brief of Deft.

3-14-74	41	Order granting Defts. State of Mont. et al, to April 1, 1974 to file brief
4- 1-74	42	Defendants' Reply Brief with cert. of service and affidavit of James Madison attached
4-30-74	43	Plaintiff's Memorandum of Points and Authorities in Response to Defendants' Reply Brief, w/Cert. of service
11-20-74	44	Decision of 3 Judge Court and that cause be ret'd to further pre-trial procedures for delineation of Govern.'s specific constitutional claims in pre-trial order of issues by stip. or order
11-20-74	45	Order denying the several motions for summary judgment in favor of pltf. U.S.A. and defts. State of Mont, et al.
12-16-74	46	Order directing attys to hold pre-trial conf. by 1-10-75 to agree on statement of facts or outline discovery schedule for Court
2-11-75	*47	Pltf's Motion for Leave to Amend Complaint & Substitute Parties Defendant
2-11-75	48	Memorandum of Points & Authorities in Support of Motion for Leave to Amend Complaint
2-25-75	*47	Order allowing pltf. to amend complaint
2-25-75	49	Amended Complaint and substituted parties defendant
3-12-75	50	Certificate of Service of Govt's motion to amend Complaint, Memorandum in support thereof and Amended Complaint

3-17-75	51	Defts' ANSWER to Amended Compl. w/ Cert. of Serv. by Mail
3-18-75	52	Invitation to U.S.A. to attend & participate in Rules Change Hearing re. Mont. Contractors' Gross Receipts Tax Act w/ proposed amend. & notice of hearing attchd, together w/Cert. of Serv. by Mailing
4- 8-75	53	Order setting P.T. Conf., 9:20 a.m., 4-25-75, Msla.
5-28-75	54	Order, parties to submit proposed discovery schedule w/in 10 days
6- 6-75	55	Defts' Proposed Discovery Schedule w/ Cert. of Serv. by Mail.
6-30-75	56	USA Interrog. to Defts.
7-18-75	57	Prelim. PT Order, discovery schedule
7-31-75	58	Defendants' Responses to Plaintiff's Request for Admissions
7-31-75	59	Defendants' Answers and Objections to Plaintiff's Interrogatories w/Certificate of mailing
8-15-75	60	Defts' Request for Admission and Interrogatories
8-15-75	61	Defts' Notice to Take Depositions w/ cert. of service by mailing
8-21-75	62	Pltf's. Motion for Enlargement of Time; w/cert. of service attached. Ext of Time to complete discy. to 10-15-75
8-21-75	63	Memorandum of Points & Authorities in Support of Pltf's. Motion for Enlargement of Time

8-25-75	64	Order the pltf. conclude inspection of defts' records in Helena, MT by 10-17-75; pltf. conclude initial disvy. depositions by 10-17-75; all further discvy. be concluded by 11-3-75; a pre-trial conf. be held on 11-10-75; that a Stipulation by filed by 11-28-75
8-26-75	65	Statement of Counsel of Deft., State of Montana et al Pertinent to Pltff's. Motion to enlarge discovery time
10- 7-75	66	Pltff's Ans. & Obj. to Defts' Request for Admissions & Interrog.
10-16-75	67	ORDER, Pre-trial Sched. PT order due; 2-10-76
10-28-75	68	Deposition of James Madison
12- 3-75	69	Deposition of Merrill A. Moran
12- 3-75	70	Deposition of John E. Templeton
12- 3-75	71	Deposition of Leo Werre
12- 3-75	72	Deposition of Herbert B. Hallock
12-19-75	73	Deposition of George L. LaRue
12-22-75	74	Deposition of Phil E. Maronick
12-23-75	75	Deposition of Robert Burns McIntyre
12-29-75	76	Deposition of William R. Lowe
1-12-76	77	Order setting hearing 3-30-76, 10:00 a.m., Blgs.
1-14-76	78	Deposition of Philip Hauck
2-27-76	79	ORDER—Pre-trial schedule including Order that PT Order be mailed to Court by 2-27-76 by defts' attys

3-10-76	80	Order setting P.T. Conf. 3-18-76, 9:30 a.m., Msla.
3-17-76	81	Defts' Statement of Facts that Pltf. refused to Admit
3-22-76	82	Stipulation that Order concerning regulatory provisions of Mont. Act. to US & its contractors, be submitted to the Court for approval
3-22-76	83	Partial Judgment and Order
3-22-76	84	Order setting evidentiary hearing 3-30-76, 9:30 a.m. Msla and allowing parties 30 da (sic) following receipt of transcript to file briefs and 20 days reply briefs
3-30-76	85	Pltf's Statement of Facts that Defts refused to admit at P.T. Conf. and Request for further P.T. Conf.
3-30-76	86	Pre-Trial Order
6-14-76	87	Brief of Pltff.
6-14-76	88	Deft's Initial Brief After Trial
7- 2-76	89	Court Reporters Steno. Note, Proceedings: 3-30 & 31-75
	90	Proceedings 4-1-76
7-19-76	91	Reply brief of Pltff USA
7-19-76	92	State of Montana's Post-trial Answering or Second Brief
7-21-76	93	Order setting the above cause for hearing on Sept. 21, 1976 at 8:30 a.m. in the courtroom of the U. S. Dist. Court in Gt. Falls, MT before a three judge panel

8-24-76	94	Designation by Judge Browning, Chief Judge, 9th Circuit of panel of judges to hear matter
11- 9-76	95	Reporter's Transcript of hearing before 3-Judge panel
3-10-77	96	Court Reporter Notes
8-19-77	97	Decision by Judges East and Smith and Dissent by Judge Kilkenny
8-29-77	98	ORDER that Pltf prepare proposed judgment
9-20-77	99	Motion for Delay in Filing Judgment of Injunction
	100	Defts' Objections to Form of Proposed Judgment
10-12-77	101	Plaintiff's Response to Defendants' Motion for Stay of Judgment
10-18-77	102	ORDER that except as noted in majority's declaratory judgment & decree of injunctive relief file contemporaneously, defendants' several motions are each denied
10-18-77	103	Final Declaratory Judgment & Decree of Permanent Injunctive Relief
10-20-77	104	Court Reporter's (T. Canaan) Transcript of Proceedings of March 30, 1976, March 31, 1976 and April 1, 1976, in 3 volumes

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF MONTANA; MONTANA STATE BOARD OF EQUALIZATION; J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants

COMPLAINT

Now comes the plaintiff, United States of America, by its attorney Otis L. Packwood, United States Attorney for the District of Montana, and complaining of the defendants alleges as follows:

1. This action is brought at the request of plaintiff's Department of the Army, and under the direction of the Attorney General of the United States, to protect the pecuniary interests and vindicate the sovereign rights of the United States.

2. The defendant State of Montana is a corporate sovereign and body politic. Defendant Montana State Board of Equalization (hereinafter referred to as "Board") is now, and at all times pertinent hereto was, an administrative agency of the State of Montana, created and existing under and by virtue of the provisions of Section 15 of Article III of the Constitution of Montana, and is, and at all times pertinent hereto was,

authorized and charged with administering and enforcing the provisions of Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended (hereinafter referred to as "license fee statute"), relating to licenses and license fees for public contractors, and the rules and regulations promulgated thereunder. Defendant J. Morley Cooper is Chairman of defendant State Board of Equalization and together with John C. Alley and Ray J. Wayrynen as members, constitute the Montana State Board of Equalization.

3. Jurisdiction over this action is conferred on this Court by Sections 1331, 1345 and 2201 of Title 28, United States Code, since the matter in controversy exceeds ten thousand dollars ($10,000), exclusive of interest and costs, and arises under the Constitution of the United States, and the action is commenced by the United States.

4. This suit is brought for the purpose of obtaining a declaratory judgment construing the application of the Federal Constitution and the laws of the United States, insofar as either or both are in conflict with and thereby prohibit the imposition, application, and enforcement of Chapter 35 of Title 84, Revised Codes of Montana, 1947 (as amended by Chapter 195 of the laws of 1967), and the rules and regulations promulgated thereunder, against the United States and its contractors and its subcontractors. Additionally, this suit is brought for the purpose of (a) enjoining, during the pendency of this action and permanently thereafter, the imposition, application, and enforcement of the Montana license fee statute, and the rules and regulations promulgated thereunder, against the United States and its contractors and its subcontractors; and (b) obtaining refund of taxes illegally imposed and collected from the United States and its contractors and its subcontractors.

5. In the performance of its governmental functions, plaintiff, United States has entered and will enter into contracts with, and has employed and will employ contractors and subcontractors to perform construction work in the State of Montana to erect, build, excavate, alter and repair buildings, structures and installations for itself, its agencies and instrumentalities, including its Department of the Army.

6. Congress, in the Armed Services Procurement Act of 1947 (Title 10, United States Code, Sections 2301 to 2314, among others), and Government Procurement Regulations (32 CFR Sections 1.901 to 1.908-6, among others), has provided for standards or factors to determine and insure the fitness, qualifications, responsibility and reliability of persons and companies contracting with the Federal Government, including those construction contractors and subcontractors who are presently employed or under contract with the Federal Government in the State of Montana.

7. The Montana license fee statute, and the rules and regulations promulgated thereunder, require contractors and subcontractors, in order to submit bids or proposals to the Federal Government or enter into contracts with the Federal Government for performing public construction work or to perform their contractual obligations with the Federal Government (a) to obtain a Public Contractor's License (Section 84-3502 of the license fee statute provides that it is unlawful for a person to engage in the business or act as a public contractor in Montana without having a Public Contractor's License), (b) to be subject to licensing requirements and regulations and to meet standards or grounds to determine fitness and responsibility which are similar in part to the hereinbefore described grounds for finding responsibility and fitness under the hereinbefore described federal stat-

ute and regulations, (c) to pay a license fee ($10 to $200), and (d) to pay an additional 1% license fee or tax on gross receipts derived from or measured by the value of contracts with the Federal Government.

8. At all times here relevant, defendants, by rulings, regulations and otherwise, have construed, imposed, and enforced and threaten to continue to impose and enforce the provisions of the Montana license fee statute, and the rules and regulations promulgated thereunder (which includes the collection of license fees or taxes), against such contractors and subcontractors who perform construction work or are under contract with the plaintiff, United States.

9. To avoid accumulation of interest and the imposition of penalties for nonpayment, such contractors and subcontractors have paid such fees or taxes to defendants in amounts in excess of $10,000 to date.

10. Plaintiff has incurred and will continue to incur liability for license fees or taxes imposed upon and collected by defendants from Federal contractors and subcontractors under authority of the Montana license fee statute in that plaintiff's contractors and subcontractors have passed and will continue to pass the cost of such taxes or license fees on to plaintiff because provisions of the contracts between plaintiff and said contractors and subcontractors require, and have required, and in accordance therewith, the United States has made, or has agreed to make, reimbursement to said contractors and subcontractors for the amounts remitted by them to defendants.

11. Upon information and belief, defendants have not imposed or enforced provisions and do not threaten to impose or enforce provisions which are similar to the Montana license fee statute, and rules and regulations

promulgated thereunder, against all contractors and subcontractors who perform construction work, nor do they threaten to do the same nor is there authority under any Montana statute to impose or enforce the same or similar provisions (which includes no authority for imposition or collection of license fees or taxes) against all contractors and subcontractors, or those contractors or subcontractors who perform construction work or are under contract with private persons, private businesses, private corporations, or against those who perform any construction work other than public construction work.

12. The said license fees or taxes collected from plaintiff's contractors and subcontractors have been erroneously and illegally demanded, collected and received by defendants because the Montana license fee statute, the rules and regulations promulgated thereunder, and the defendant Board's construction and enforcement thereof have been and are erroneous, invalid, and without legal force or effect because they contravene the Constitution and laws of the United States of America in that they:

(a) illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business;

(b) illegally impose a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects;

(c) illegally and improperly interfere with the Federal Government's power to select contractors and schedule construction, and are in conflict with Federal law and policy regulating Federal procurement;

(d) illegally violate the immunity of the Federal Gov-

ernment and its instruments from state control in the performance of their functions;

(e) illegally frustrate the Federal policy of selecting the lowest possible bidder; and

(f) illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

13. Under the terms of agreements between the Government and its contractors and its subcontractors, the Government is entitled to the benefit of any recovery of any part of any said payments imposed, remitted to and received by defendants under authority of the Montana license fee statute, and the rules and regulations promulgated thereunder, and therefore, all said license fees or taxes which have been and will be unconstitutionally and illegally imposed and collected as hereinbefore alleged are, and will be, rightfully due, owing and payable to plaintiff as money had and received for its use and benefit.

14. Unless the defendants herein and all persons acting in concert with them are enjoined, during the pendency of this action and permanently thereafter, from acting as hereinbefore alleged (a) the plaintiff will suffer irreparable injury in that the operations of its agencies and instrumentalities, including its Department of the Army, will be harmed, delayed or impeded through the aforesaid illegal interference with and illegal regulation of contractors and subcontractors who perform construction work for or are under contract with the Federal Government; (b) multiple litigation will result since each of the many contractors and subcontractors employed by or under contract with the plaintiff, United States, in

Montana are required, and will be required, under Montana law to file individual claims or bring separate actions to contest the validity of these hereinbefore alleged illegally imposed and collected license fees or taxes each time they are paid over to defendants (within 30 days after each contractor or subcontractor receives each increment of payment); (c) the plaintiff will suffer irreparable injury in that no interest is provided for under Montana law on amounts of illegally collected taxes refunded by the State of Montana; (d) the plaintiff will suffer irreparable injury in that it is required under its contracts with its contractors to reimburse or pay its contractors and subcontractors all costs of contesting the validity of such hereinbefore mentioned illegal license fees, or taxes, including attorneys fees; (e) the plaintiff, its contractors and subcontractors will suffer irreparable injury if they do not comply with the hereinbefore alleged illegal license fee statute and regulations in that the license fee statute provides criminal penalties for noncompliance.

15. The relief prayed for herein requires this case to be heard by a Court of three judges.

WHEREFORE, plaintiff prays judgment:

1. Declaring that the Federal Constitution and laws of the United States are in conflict with and thereby prohibit the imposition, application and enforcement of the Montana license fee statute, and the rules and regulations promulgated thereunder, against the United States and its contractors, and its subcontractors because such statute, regulations, and defendant Board's enforcement thereof:

(a) illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business;

(b) illegally impose a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects;

(c) illegally and improperly interfere with the Federal Government's power to select contractors and schedule construction, and are in conflict with Federal law and policy regulating Federal procurement;

(d) illegally violate the immunity of the Federal Government and its instruments from state control in the performance of their functions;

(e) illegally frustrate the Federal policy of selecting the lowest possible bidder; and

(f) illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

2. Restraining and enjoining defendants and all persons acting under their authority, during the pendency of this action and permanently thereafter, from enforcing the provisions of the Montana license fee statute, the rules and regulations promulgated thereunder, and from imposing, assessing or collecting such hereinbefore described license fees or taxes provided for by the license fee statute from contractors or subcontractors performing construction work or under contract with the Federal Government; and

3. Restraining and enjoining defendants and all persons acting under their authority, during the pendency of this action, from expending, disbursing or allotting the funds (in amounts as yet unknown) paid to defendants by plaintiff and its contractors and subcontractors under the license fee statute since January 1, 1967; or in lieu thereof, enter an order requiring defendants to deposit such funds with a disinterested third party (said depository or disinterested third party's reasonable fees and charges to be allowed by this Court for services) and provide that such third party shall invest and reinvest the same in interest bearing obligations of the United States of America, holding the same in this form collecting and accumulating interest thereon until the further order of this Court, or until the final determination of this cause.

4. Directing defendants to refund or pay to plaintiff, with interest, all such amounts or sums as have been paid to defendants by plaintiff and its contractors and its subcontractors under the license fee statute; and

5. Granting plaintiff such other and further relief as may be just and proper in the premises, together with plaintiff's costs and disbursements.

OTIS L. PACKWOOD
United States Attorney

By: Otis L. Packwood
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

No. 1989

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF MONTANA; MONTANA STATE BOARD OF EQUALIZATION; J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants.

ANSWER OF DEFENDANTS

Come now the defendants in the above-entitled action and for their Answer to plaintiff's Complaint on file herein, admit, deny and allege as follows:

1.

Answering the allegations of paragraph "1." thereof, defendants deny having sufficient knowledge or information to form a belief as to the truth thereof and therefore deny the same.

2.

Admit the allegations of paragraph "2." thereof, except that the enabling constitutional legislation for the creation of said Board is found in Section 15 of Article XII of the Constitution of the State of Montana.

3.

Answering the allegations of paragraph "3." thereof, defendants deny that jurisdiction is conferred on this

Court by Section 1331, Title 28, U. S. C., in that neither the statute in question nor the actions of the defendant Board have damaged the plaintiff in any dollar amount whatsoever and the required "matter in controversy" under Section 1331 is lacking. Deny that Section 2201, U. S. C. provides for jurisdiction and allege that it merely creates a remedy if jurisdiction is otherwise established. Admit that jurisdiction is conferred by Section 1345, Title 28, U. S. C., but in that regard allege that this Court should not exercise its jurisdiction but should adopt a position of abstention in favor of obtaining a final determination by the Supreme Court of Montana in the now-pending state court action of *Peter Kiewit & Sons, Inc., -vs- State Board of Equalization*, Cause No. 34859 of Lewis & Clark County and which said case involves the same issues as are here involved but was commenced prior to the institution of this case. Such abstention should be adopted because of the history of the legislation here involved (Chapter 35, Title 84, R. C. M. (1947)) as mirrored in the case of *Schultz-Lindsay -vs- State Board of Equalization*, 145 Mont. 380, 403 P.(2d) 635 (1965) wherein the Montana Supreme Court recognized the existence of certain tax inequities but found that the legislation involved in that decision had not attacked such inequities in a constitutional manner; and the following 1967 legislature enacted as a remedial measure the legislation being now attacked in this action but which the Montana Supreme Court has not yet reviewed.

4.

Answering the allegations of paragraph "4." thereof, defendants admit that in this suit plaintiff seeks the results enumerated in said paragraph. Deny that plaintiff is entitled to the declarations it seeks. Deny that taxes

were illegally imposed. Deny each and every allegation of said paragraph not herein specifically admitted.

5.

Admit the allegations of paragraphs "5." and "6." thereof.

6.

Answering the allegations of paragraph "7." thereof, defendants deny that contract bidders on Federal Government projects are required to obtain a Public Contractor's License in order to tender a bid. Admit that after the Federal Government has awarded a bid to any particular contractor the State of Montana requires that such contractor obtain a Public Contractor's License by paying a fixed, appropriate fee as provided by the statute here in question and become liable for future payment to the State of Montana of one (1%) per cent of the gross receipts of said contractor on the work actually performed within the State of Montana as a tax on the privilege of doing business within said State. Deny that the determination made by the Federal Government of the qualifications of its contractors is in anywise reviewed or altered by the defendants or that the defendants in anywise supervise the performance by said contractors of jobs with the Federal Government. Deny each and every allegation contained in said paragraph and not hereinabove specifically admitted.

7.

Answering the allegations of paragraph "8." thereof, defendants admit that they have administered and enforced and will continue to administer and enforce said license fee statute in the manner outlined in the foregoing paragraph "6." of this Answer and to impose and collect the fees or taxes specified in said act as to contractors or subcontractors performing work for the

United States within the State of Montana on lands not exclusively within the jurisdiction of the United States. Deny each and every allegation contained in said paragraph and not hereinabove specifically admitted.

8.

Answering the allegations of paragraph "9." thereof, defendants deny that penalty and/or interest are imposed on contractors or subcontractors. Admit that fees or taxes in excess of $10,000.00 have been paid to the State of Montana pursuant to said licensing act. Deny that the plaintiff has or should have any interest in said taxes so paid, and allege that such payment by contractors not a party to this action does not establish any amount in controversy under Section 1331, Title 28, U. S. C.. Deny each and every allegation contained in said paragraph and not hereinabove specifically admitted.

9.

Deny the allegations of paragraph "10." thereof. Specifically deny that said license fee statute is a tax upon the United States or its property or agents. Deny that the plaintiff is required to remit or pay anything whatsoever to the State of Montana. Allege that said tax (or license) is a tax upon the privilege of a contractor's doing business within the State of Montana and is imposed by the Montana Legislature in performance of its duties to equitably tax property in Montana for the support and maintenance of the State Government as authorized and directed by Article XII, Section 1, Montana Constitution. Deny that said tax-paying contractors are required by the act in question to pass the cost of such taxes on to the plaintiff in any sense other than that the tax is an item of the total cost of their doing business. Deny that any impact on the plaintiff is substantial or direct. Deny that the defendants at any time

required the plaintiff or any contractor with the plaintiff to have the plaintiff assume the tax on said contractors and, in that regard, allege that if the plaintiff contracted to do so, such contract is of the plaintiff's own election and volition and is not binding upon these defendants nor does it create an inconvenience, impact or effect on the plaintiff's operations which is binding upon the defendants or should be considered in these proceedings. Deny each and every allegation contained in said paragraph and not hereinbefore specifically admitted.

10.

Answering the allegations of paragraph "11." thereof, defendants admit that the act in question which they are administering and being Chapter 35 of Title 84, R.C.M. (1947) as amended was enacted in 1935, and at all times since then and presently it has had application only to Public Contractors and does not apply to Private Contractors. That there is a logical and well-recognized class of construction work known as "public works" and there is another logical and well-recognized class of construction work known as "private work". That the act is administered as to contractors engaged on public works within the State of Montana. That it is not administered as to contractors engaged in private works. That the statutory license fees and taxes provided by the 1967 amendment of the Public Contractors act is and will continue to be assessed against and collected from public contractors as to receipts from public contracts performed in Montana. That no immediately comparable fees or taxes are or will be assessed against contractors performing private contracts in Montana; however, because the Montana Corporation License Tax and/or Individual Income Tax and property taxes must be paid by private and public contractors alike and the fees and

taxes of Public Contractors under the act here in question are directly credited against such License Tax or Individual Income Tax and property taxes are refunded, the result is that contractors with private jobs, i.e., "private contractors" are taxed in substantially the same manner as "public contractors". Deny each and every allegation of said paragraph not hereinabove specifically admitted.

11.

Deny the allegations of paragraph "12." thereof.

12.

Deny the allegations of paragraph "13.", and in those regards allege that the act in question as passed by the Montana Legislature and administered by the defendant Board levies a tax on the public contractors as defined in said act. That if a public contractor pays a license or a gross receipts tax and the same has been improperly levied and collected in whole or in part by the defendant Board and was paid under protest by the contractor, a refund will be made to the taxpayer but to no other person, corporation or entity. Allege that if the plaintiff, United States Government, in some manner in the execution of its limited power delegated to it by the sovereign states under the United States Constitution has lawfully contracted with one or more independent contractors performing work for it in Montana to bring this action and to endeavor to obtain a repayment of taxes to any particular contractor plus his attorneys' fees or has contracted with such contractors to have them bring such action as appears to be alleged in paragraph "14." of plaintiff's Complaint, then such contract, if legal, was without the participation, knowledge or consent of the defendant Board and is nowise binding upon it. That any indebtedness or inconvenience the plaintiff has

assumed in these regards is voluntary to the plaintiff and is not required by the Act in question or by the administration of this defendant Board and in nowise creates or augments any impact of the administration of the Act upon lawful activities of the plaintiff.

13.

Deny the allegations of paragraph "14." thereof and allege that the Act in question was enacted and is being administered in accordance and in full conformity with the United States Constitution, the Constitution of the State of Montana and the rules of law pertinent to the implied supremacy of the lawful activities of the United States of America over tax measures of any particular sovereign state.

14.

Admit the allegations of paragraph "15." thereof.

15.

Deny each and every allegation contained in said Complaint and not hereinbefore specifically admitted.

DATED this 10th day of May, 1971.

ROBERT L. WOODAHL,
Attorney General of the State of Montana;
EDWARD JENE BELL, Tax Counsel, State Board of Equalization; and
POORE, McKENZIE & ROTH,
Special Assistant Attorneys General

By: Robert A. Poore
Attorneys for Defendants

Fourth Floor, Silver Bow Block,
Butte, Montana 59701.

(Acknowledgement of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

STATE OF MONTANA; MONTANA STATE BOARD OF EQUALIZATION; J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,
Defendants.

ANSWERS TO PLAINTIFF'S REQUEST FOR ADMISSIONS

The following are the replies of the Defendants abovenamed to the Request for Admissions made by the Plaintiff.

3. That no Montana law or regulation provides for a 1% gross receipts tax on private contractors and subcontractors.

ANSWER: Admit

(All Requests and Answers other than No. 3 omitted in printing).

STATE OF MONTANA)
County of Silver Bow) ss.

ROBERT A. POORE, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the defendant in the above-entitled matter. That in conference with attorney Edward Jene Bell, another of defendant's attorneys of record in this case, the foregoing answers to plaintiff's Request for Admissions have been prepared. That the answers contained in the above response to Request for Admissions of the plaintiff are true to the best of affiant's knowledge and belief.

ROBERT A. POORE

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTNA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF MONTANA; MONTANA STATE BOARD OF EQUALIZATION; J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants.

AFFIDAVIT OF ROBERT A. POORE IN SUPPORT OF MOTION TO DISMISS WHICH THE COURT MAY DECIDE TO TREAT AS A MOTION FOR SUMMARY JUDGMENT

STATE OF MONTANA)
County of Silver Bow) ss.

ROBERT A. POORE, first being duly sworn upon oath, deposes and says:

1. I am a Special Assistant Attorney General for the State of Montana and at all times pertinent to developments in the above-entitled matter was chief defense counsel of record for the defendants in the case of *Peter Kiewit Sons' Co. -vs- State Board of Equalization of the State of Montana, et al.*, which was Cause No. 34,859 of the files of the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark. Also I was chief counsel of record for the Respondents in the appeal of the foregoing *Kiewit*

case to the Supreme Court of the State of Montana where such cause was No. 12,199 of said Supreme Court files. That each and all of the following described documents were part and parcel of the trial or preparation for trial or appeal in said *Kiewit* case and are true and correct copies of the originals used by the particular court — i.e., trial or appellate, to-wit:

A. **Group "A"**: Pleadings in State District Court *Kiewit* case:

1. Plaintiff's Complaint filed April 2, 1971.
2. Initial Appearance of Defendants by Motion to Strike filed May 4, 1971.
3. Defendants' Memorandum of Authorities in Support of Motion to Strike.
4. Plaintiff's Memorandum of Authorities in opposition to Defendants' Motion to Strike.
5. Court's Minute Entry of June 4, 1971, as to receiving oral argument by counsel on Motion to Strike and making Order denying such Motion.
6. Answer of Defendants filed June 16, 1971.
7. Set of 15 Interrogatories from Defendants to Plaintiff filed June 16, 1971.
8. Plaintiff's Answers and Objections to Defendants' Interrogatories filed July 6, 1971.
9. Defendants' Memorandum of Authorities in Opposition to Plaintiff's Objections to Defendants' Interrogatories.
10. Minute Entry of Argument on Plaintiff's Objections to Defendants' Interrogatories dated July 22, 1971. Objections sustained.

11. Set of 44 Requests for Admissions posed by plaintiff to defendants filed August 23, 1971.
12. Defendants' Responses to Plaintiff's Requests for Admissions filed September 17, 1971.
13. Notation of the filing of the discovery depositions of prospective witnesses Legg, Siverson and Pew on September 21, 1971.
14. Court's notation of September 21, 1971, setting date of trial for November 1, 1971.
15. Defendants' Motion to Compel Answers to Deposition Questions propounded to witness Ronald L. Legg filed September 24, 1971, and supporting Affidavit of Robert A. Poore, and Notice of Motion.
16. Memorandum of Authorities of Defendants in Support of Requiring deposition witness to answer questions.
17. Memorandum of Authorities of Plaintiff in Opposition to Requiring deposition witness to answer.
18. Minute Entry of oral argument of Court's Order of September 29, 1971, requiring witness to answer.
19. Set of four Interrogatories from plaintiff to defendants filed September 29, 1971.
20. Clerk's notation of October 12, 1971, of the filing of the discovery depositions taken by plaintiff of prospective witnesses Dolan and Lowe.
21. Defendants' Answers to Interrogatories posed by plaintiff and filed October 14, 1971.

22. Response by plaintiff to court's Order of September 29, 1971, requiring deposition answers.
23. Notation of October 20, 1971, of filing of plaintiff's discovery deposition as to witness Schye.
24. Defendants' Trial Brief.
25. Clerk's minute entries of the trial conducted before Hon. Victor H. Fall on November 1 and 2, 1971.
26. Plaintiff's Proposed Findings of Fact and Conclusions of Law filed November 22, 1971.
27. Defendants' Proposed Findings of Fact and Conclusions of Law filed November 22, 1971, and amended by Judge Fall (page 8) and thereupon adopted by the Court.
28. Court's Minute Entry of November 22, 1971, directing Defendants to Prepare and Submit form of Judgment.
29. Plaintiff's Post-Trial Memorandum.
30. Defendants' Post-Trial Memorandum.
31. Judgment made and entered November 30, 1971.
32. Notice of Entry of Judgment filed November 30, 1971.
33. Plaintiff's Exceptions and Objections to Findings of Fact and Conclusions of Law filed December 6, 1971.
34. Plaintiff's Motion to Amend and Make Additional Findings filed December 6, 1971.

35. Court's Order of December 13, 1971, after argument denying Plaintiff's pending Motions to Amend and Make Additional Findings.
36. Plaintiff's Notice of Appeal filed December 21, 1971.

B. **Group "B":** Documents in Montana Supreme Court *Kiewit* case:

1. Transcript (two volumes) of Testimony Taken at Trial.
2. Kiewit Contract No. DACW67-71-C-0027 of 11/10/70 with Department of Army.
3. Motion of U. S. Government for Leave to File Brief as Amicus Curiae.
4. Order of Chief Justice Granting U. S. Government's Motion to file amicus curiae brief dated April 3, 1972.
5. Motion of the United States to Participate in Oral Argument before Montana Supreme Court.
6. Order of Chief Justice Granting Oral Argument privilege to U. S. Government.
7. Appellant's Brief.
8. Respondents' Brief.
9. Brief of United States as Amicus Curiae.
10. Appellant's Reply Brief.
11. Respondents' post-argument letter of 12/8/72 to Supreme Court and citation of recently-decided Montana case.
12. Supreme Court Opinion.

C. **Group "C"**: Post-Judgment Proceedings in Montana Supreme Court:

1. Appellant's Petition for Rehearing dated January 18, 1973.
2. Appellant's Brief in Support of Petition for Rehearing.
3. Respondents' Objections to Petition for Rehearing.
4. Supreme Court Order denying Petition for Rehearing dated January 29, 1973.
5. Notice of Appeal to U. S. Supreme Court by Appellant.
6. Application to Associate Justice Douglas for Extension of Time to Docket Appeal dated April 12, 1973.
7. Motion of Appellant to Dismiss Appeal to the Supreme Court of the United States dated June 27, 1973.
8. Decree Dismissing Appeal.

Further affiant sayeth not.

ROBERT A. POORE

Subscribed and sworn to before me this 12th day of December, 1973.

MARCELLA HARGAN, Notary
Public for the State of Montana
Residing at Butte, Montana
My Commission expires
November 22, 1976

(Acknowledgement of Service omitted in printing)

(Documents Group A. Nos. 1, 6 and 27 included, remaining exhibits to Affidavit omitted in printing).

GROUP A No. 1

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

Civil No. 34859

PETER KIEWIT SONS' CO., a Corporation,
Plaintiff,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, Peter Kiewit Sons' Co., a corporation, and complaining of the Defendants alleges as follows:

I.

That at all times pertinent hereto, Plaintiff was, has been and now is a corporation organized and existing under the laws of the State of Nebraska and authorized to do business in the State of Montana.

II.

That the Defendant, State Board of Equalization of the State of Montana (hereafter referred to as "Board") is now, and at all times pertinent hereto was, an administrative agency of the State of Montana, created and existing under and by virtue of the provisions of

Section 15 of Article III of the Constitution of Montana, and is, and at all times pertinent hereto was, charged with administering and enforcing the provisions of Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended (hereinafter referred to as "license fee statute"), relating to licenses and license fees for public contractors, and the rules and regulations promulgated thereunder. Defendant J. Morley Cooper, is Chairman of Defendant State Board of Equalization and together with John C. Alley and Ray J. Wayrynen, as members, constitute the State Board of Equalization of Montana.

III.

That this action is brought pursuant to and in accordance with Chapter 45, Title 84 of the Revised Codes of Montana, 1947, as amended, to recover illegal license fees or taxes in the sum of Eight Thousand Seven Hundred Twenty-Six and 47/100 Dollars ($8,726.47) unlawfully imposed, demanded, and collected by Defendants from Plaintiff; and further, to have the unlawful and illegal license fee statute, under which the license fees are collected, declared void.

IV.

That the Plaintiff is now actively engaged in the business of performing construction contracts (including contracts with the Federal Government) in the State of Montana and intends in the future to continue to engage in such business.

V.

That the Fortieth Legislative Assembly of the State of Montana enacted Chapter 195 of the Laws of 1967 (now codified in Chapter 35, Title 84 of the Revised Codes of Montana, 1947). That Section 84-3502 of the Revised Codes of Montana, 1947, provides that it is unlawful for a person or business to engage in the business

or act in the capacity of a public contractor in Montana without having a Public Contractor's License.

VI.

That by the terms of the license fee statute (as amended by Chapter 195 of the Laws of 1967), Plaintiff (Peter Kiewit Sons' Co.) in order to be entitled to such aforementioned Public Contractor's License and in order to perform its contracts in Montana, is obligated (a) to meet State requirements, standards or grounds to determine fitness and responsibility which are similar in part to requirements, standards and grounds for determining responsibility and fitness under Federal law and regulations governing Federal procurement (Title 10, United States Code, Sections 2301 to 2314, among others; 32 CFR, Sections 1.90 to 1.908-6, among others), and (b) to pay to Defendant Board, an additional public contractor license fee in a sum equal to one percent (1%) of the gross receipts from public contracts from business sources within the state during the income year for which the license is issued.

VII.

That Defendant Board is charged with the duty of establishing rules and regulations necessary for the implementation and enforcement of said law, and the Board has construed, imposed and enforced the provisions of the license fee statute against Plaintiff and threatens to continue to do the same in the future (including collecting said license fees or taxes from Plaintiff).

VIII.

That upon information and belief, Defendants have not imposed or enforced provisions and do not threaten to impose or enforce provisions which are similar to the Montana license fee statute, and the rules and regula-

tions promulgated thereunder, against all contractors and subcontractors who perform construction work, nor do they threaten to do the same nor is there authority under any Montana statute to impose or enforce the same or similar provisions which are imposed against Plaintiff (which includes no authority for imposition or collection of license fees or taxes) against all contractors and subcontractors, or those contractors or subcontractors who perform construction work or are under contract with private persons, private businesses, private corporations, or against those who perform any construction work other than public construction work.

IX.

That because of the aforementioned license fee statute, the Plaintiff was required to and did, on February 3, 1971 and on March 19, 1971, file Gross Receipts Withholding Reports with Defendant Board, and transmitted therewith payment in the amount of Two Thousand Seven Hundred Seventy and 32/100 Dollars ($2,770.32) and Five Thousand Nine Hundred and Fifty-Six and 15/100 Dollars ($5,956.15) respectively; that said sums were paid to Defendant Board under written protest in accordance with the provisions of Chapter 45, Title 84 of the Revised Codes of Montana, 1947; that copies of said written protests and Gross Receipts Withholding Reports are attached hereto and marked Exhibits "A", "B", "C", and "D", and by this reference made parts hereof.

X.

That the said license fees or taxes collected from Plaintiff have been erroneously and illegally demanded, collected, and received by Defendants because the Montana license fee statute, the rules and regulations promulgated thereunder, and the Defendant Board's construc-

tion thereof have been and are erroneous, invalid, and without legal force or effect because they contravene the constitutions and laws of the United States of America and the State of Montana in that they:

(a) illegally discriminate against the Plaintiff, the United States, and its agencies and instrumentalities, and those with whom the United States does business, and deny them due process of law and the equal protection of the laws;

(b) illegally impose a tax on Plaintiff which is not uniform upon the same class of subjects;

(c) illegally and improperly interfere with the Federal Government's power to select contractors and schedule construction and are in conflict with Federal law and policy regulating Federal procurement;

(d) illegally violate the immunity of the Federal Government and its instruments (including Plaintiff) from state control in the performance of their functions;

(e) illegally violate the Montana State Constitutional Prohibition against special laws;

(f) illegally frustrate the Federal policy of selecting the lowest possible bidder; and

(g) illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

WHEREFORE, Plaintiff prays Judgment:

(1) For refund, with appropriate interest, of all said license fees or taxes erroneously remitted to and illegally

demanded and received by the Board from Plaintiff to date ($8,726.47).

(2) For a determination by the Court that Chapter 35, Title 84, Revised Codes of Montana, 1947, as amended by Chapter 195, Laws of 1967, illegally violates (a) the constitution and laws of the State of Montana and (b) the constitution and laws of the United States, and therefore is void and of no force and effect;

(3) For Plaintiff's costs in this suit expended;

(4) For such other relief as to the Court may appear to be meet and just.

DATED this 2d day of April, 1971.

GARLINGTON, LOHN &
ROBINSON

By: Sherman V. Lohn
199 West Pine, P. O. Box 1471
Missoula, Montana 59801

Attorneys for Plaintiff

(Exhibits to Complaint omitted in printing)

GROUP A No. 6

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 34, 859

PETER KIEWIT SONS' CO., a Corporation,
Plaintiff,

-vs-

STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN, as members thereof,

Defendants.

ANSWER:

Come now the defendants in the above-entitled action and for their Answer to plaintiff's complaint on file herein, admit, deny and allege as follows:

1.

Admit the allegations of paragraph "I." thereof.

2.

Admit the allegations of paragraph "II." thereof, except that the enabling constitutional legislation for the creation of said defendant Board is found in Section 15 of Article XII of the Constitution of the State of Montana.

3.

Answering the allegations of paragraph "III." thereof defendants admit that Chapter 45 of Title 84, R.C.M.

(1947 as amended) provides for the payment of taxes under protest and the institution of actions by taxpayers to recover the same. Deny that the license fees or taxes here involved as specified by plaintiff were illegally levied or collected. Deny that said license fee statute, Chapter 35 of Title 84, R.C.M. (1947, as amended) is void or unconstitutional. Deny each and every other allegation contained in said paragraph.

4.

Admit the allegations of paragraphs "IV." and "V." thereof.

5.

Answering the allegations of paragraph "VI." thereof defendants deny that any license is required by the State of Montana of a public contractor bidding on a federal project and in that regard alleges that only after such a bidder has obtained a contract is a Public Contractors License required. Deny that the defendant Board supervises or otherwise determines the fitness and responsibility of a contractor bidding on or performing a contract with the Federal Government. Admit that a public contractor performing a public contract in Montana is obligated pursuant to Section 84-3505, sub. (5) to pay a sum equal to one per cent (1%) of the gross receipts from such public contract. Deny each and every other allegation contained in said paragraph.

6.

Answering the allegations of paragraph "VII." thereof defendants admit that pursuant to the authority and direction contained in Section 83-3515 R.C.M. (1947, as amended) defendants have issued Regulations implementing said Chapter 35. Admit that the defendant Board has enforced and will continue to enforce the requirements of Section 83-3505(5) and to collect said 1%

gross receipts license fee or tax which the Montana Legislature lawfully and properly and pursuant to the mandate of Section 1, Article XII of the Montana Constitution levied upon the valuable property right of doing business in Montana. Deny that such tax is illegal or unconstitutional or that such anticipated collection constitutes a "threat." Deny each and every allegation contained in said paragraph not hereinabove specifically admitted.

7.

Answering the allegations of paragraphs "VIII." and "IX." thereof defendants admit that since the enactment of Chapter 35 of Title 84 in 1935 the State of Montana has classified contractors as either public contractors or private contractors and has defined the term "public contractor". Alleges that such classification of "public" and "private" (or non-public) is clear-cut and reasonable. Admits that all public contractors are required to pay the license fees (including the 1% gross receipts fee or tax) required by Section 84-3505(5) and to obey the provisions of said Chapter 35 as administered and interpreted by the defendant Board as set forth in its Regulations. Admit that contractors not within the well-defined and reasonable classification of "public contractors" are not subject to the license fees of Chapter 35, and that the defendants are not "threatening" to endeavor to subject such private or non-public contractors to the fees required of public contractors under Chapter 35. Allege that all contractors of a particular class (public or private) are treated by defendants in the same manner, and that because the Montana Corporation License Tax and/or Individual Income Tax and property taxes must be paid by private and *public* contractors alike and the fees and taxes of public contractors under the act here in question are directly credited against

such License Tax or Individual Income Tax, and property taxes are refunded, the result is that the contractors with private jobs (i.e., "private contractors") are taxed substantially in the same manner as "public contractors." Deny each and every allegation of said paragraph not hereinbefore specifically admitted.

8.

Deny the allegations of paragraph "X." thereof.

9.

Deny each and every allegation contained in said Complaint not hereinbefore specifically admitted.

WHEREFORE, defendants having fully answered pray that the plaintiff take nothing by virtue of its complaint and that its prayers for a declaration that Chapter 35 of Title 84 be declared void and unconstitutional be denied and that defendants be awarded their costs of suit incurred herein.

DATED this 15th day of June, 1971.

ROBERT L. WOODAHL,
Attorney General of the State
of Montana; EDWARD JENE
BELL, Tax Counsel, State
Board of Equalization; and
POORE, McKENZIE & ROTH,
Special Assistant Attorneys
General

By: Robert A. Poore
Attorneys for Defendants

(Certificate of Service omitted in Printing)

GROUP A No. 27

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 34,859

PETER KIEWIT SONS' CO.,
Plaintiff,

-vs-

STATE BOARD OF EQUALIZATION of the State of Montana, J. MORLEY COOPER, Chairman, JOHN C. ALLEY and RAY J. WAYRYNEN as members thereof,
Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial before the above-entitled Court sitting without a jury on Monday, November 1, 1971 and concluded on Tuesday, November 2, 1971. Messrs. Sherman V. Lohn and Lawrenc F. Daly of the law firm of Garlington, Lohn & Robinson of Missoula, Montana, appeared as counsel for the plaintiff; Edward Jene Bell, Esq., Tax Counsel for the State Board of Equalization, and Robert A. Poore of the law firm of Poore, McKenzie & Roth of Butte, Montana, as special Assistant Attorney General on behalf of Hon. Robert L. Woodahl, Attorney General for the State of Montana, appeared as counsel for the defendants.

And the parties having respectively produced evidence on the issues involved in the case and having respectively filed trial briefs and post trial briefs and memoranda on the legal issues involved; and the Court having now considered such evidence and being fully advised in the premises and having informed itself as to the applicable law, and the matter having been submitted to the Court for its decision,

NOW THEREFORE, pursuant to Rule 52, M.R. Civ. Pr. the Court now finds the facts to be as follows:

FINDINGS OF FACT

1. That at all times pertinent to this matter the Plaintiff, PETER KIEWITT SONS' CO., has been and now is a corporation organized and existing under the laws of the State of Nebraska with its principal office and headquarters at Omaha, Nebraska and authorized to do business in the State of Montana.

2. That the Defendant, STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA (hereinafter referred to as "Board") is now and at all times pertinent to this matter was an administrative agency of the State of Montana created and existing under and by virtue of the provisions of Section 15 of Article XII of the Constitution of the State of Montana, charged with administering and enforcing the provisions of Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended and of the rules and regulations pertinent thereto as promulgated by the Board as directed in said Act (hereinafter referred to as "the Act") relating to licenses and license fees for public contractors. That defendant J. MORLEY COOPER is Chairman of said Board and together with Messrs. JOHN C. ALLEY and RAY J. WAYRYNEN constitute said Board.

3. That on October 9, 1970 the Plaintiff as an independent contractor was awarded contract #DACW67-00027 (4398) by the Department of the Army, Seattle District, Corps of Engineers of the United States of America, for the relocation of Montana Highway #37 on the Kootenai River, Libby Dam and Reservoir, Lincoln County, Montana. That the contract price for said job was $6,389,817.00. That in addition certain extra work to be performed at additional cost has been ordered by the Federal Government and has been performed by the Plaintiff as an independent contractor. That in the performance of said contract by the Plaintiff it was and is an independent contractor and was not and is not an employee or servant or agent of the Federal Government.

4. That in its performance of the federal contract referred to above the plaintiff is a "public contractor" within the definition of that term in the Act and in the regulations and rulings of the Board issued pursuant to Section 84-3515 of the Act.

5. That the Plaintiff was not required to possess or obtain a license under the Act in order to bid on and obtain the federal contract here in question; nor is any public contractor bidding on a federal job required by Montana law to have such a license prior to being awarded a contract by the federal government.

6. That after being awarded a federal contract for the performance of construction work in Montana a contractor is required to obtain an appropriate license under the provisions of Section 84-3505 of the Act for revenue accounting purposes, and the Plaintiff did obtain and have such a license.

7. That the defendant Board does not supervise the performance of a federal contract by a public contractor

in Montana or in any way interfere with the federal government's selection of its contractors to perform federal jobs in Montana, or in any way interfere with the federal government's supervision of such contractors' performance of their contracts. That the defendant Board in nowise participated in or in any way or to any degree controlled or limited the selection by the U. S. Government of the defendant for the Libby Dam contract here in question and at no time since the awarding of that contract to the plaintiff have the defendants in anywise supervised or controlled or hampered or impeded plaintiff's performance of such contract.

8. That the plaintiff entered upon its performance of the federal Libby Dam contract here involved and was paid installments on said contract price by the Federal Government as the work progressed. That pursuant to the requirements of Section 84-3505 of said Act the plaintiff paid one percent (1%) of its receipts from the Federal Government to the defendant State Board. Thus on or about April 22, 1971 when the plaintiff was paid the sum of $682,564.00 by the Federal Government, it in turn paid 1% thereof or $6,825.64 to the State Board; and when on or about May 25, 1971, it was paid the sum of $244,564.00, it in turn paid $2,447.89 thereof to the State Board. That such payments by the plaintiff were made under protest.

9. That the Federal Government did not make any payment whatsoever to the State Board of Equalization. That the Federal Government is not required to withhold any payments from a federal contractor in Montana or remit the same to the State Board, and in no instance does it do so. That all payments required by federal public contractors under the Act are made directly by the contractor; although on state jobs the state subdivision does withhold payments to the contractor and does remit the same to the State Board on his behalf.

10. That while the moneys with which the 1% gross receipts tax is paid doubtless come from the property owner (here Federal Government) on contracts that are performed at a profit, the tax does not by any means necessarily increase the cost to the property owner (Federal Government) of the project in question because the impact on the contractor of the tax after reduction for personal property and income taxes under Section 84-3514 of the Act is a small and insignificant one of many factors which determine the amount of a contractor's bid, which in turn, determine the contract price. That the contract price determines the cost of the project to the property owner. That in working up a bid to tender on a public contract, contractors list the estimated direct and indirect expenses that the job will entail. That to this total sum of estimated expenses is added an item called "margin" by the contractors. That "margin" is a fluid percentage which is controlled by the bidding contractor and varies from job to job. That on the Libby Dam project the margin that the plaintiff used was 46%. That included in such "margin" was an item of anticipated profit for the plaintiff of 18% of the total bid price. That the *net* gross receipts tax, if any, is a miniscule proportion of the variable margin figure because it must inevitably vary between a maximum of one (1%) percent of the gross contract price and a minimum of zero (0%) percent of such contract price. That since all public contractors have items of heavy equipment, or cars, trucks, etc., used on a project and which are subject to personal property taxes in Montana; and since all such personal property taxes are refundable dollar for dollar out of the 1% gross receipts tax, such tax in its final amount must be and is less than 1% of

the gross contract price. Furthermore, the contractor can use any portion of the 1% tax remaining after repayment of the personal property taxes as a dollar for dollar direct credit against income taxes. That in the Kiewit contract here in question the plaintiff paid $35,803.22 of personal property taxes to Lincoln County in 1971. That if the contract takes two more years to complete as is estimated; and if such personal property taxes average that amount each year, the personal property taxes on the job will total about $108,000.00. That if the anticipated job profit of 18% is reduced in this projection to a true net as low as 10% the plaintiff will still have a net income of approximately $640,000.00 on the whole job on which it will (per 1971 tax rates) pay a Montana corporation license (income) tax of 6¼% or $40,000. That the 1% gross receipts prepayment to the State Board will be $64,000. That such prepayments will be reduced (and actually wiped out) by the personal property taxes of $108,000.00. And if anything were still to be remaining (not here apparent) such remainder could be applied dollar for dollar in reduction of the income tax of $40,000. That the gross receipts tax, if any net remains, is such a minuscule proportion of the total bid and is so outweighed and outleveraged by the variable and flexible figures of "margin" and "estimated profit" (46% and 18% respectively under the Kiewit bid) as not to be a significant factor for a bidding contractor in arriving at his bid for the contract price — which is what controls the cost to the owner on any particular job. That the high-leveraged bidding items of margin and anticipated profit very substantially determine a bid, and in turn, the contract price; and such items are widely variable and totally within the control of the bidder and are governed by a number of considerations. That such considerations include how badly the contractor wants the job in order to keep crews and equipment working; who his competitive bidders are and how badly he believes they want the job; how close or convenient the job-site is, plus many other factors. That it cannot be said that the gross receipts tax here in question increases the cost of work to the owner. That if there is any economic impact in any given case it is insignificant, indirect and insubstantial.

11. That the Federal Government has caused this litigation to be commenced by the plaintiff and will pay the cost of the same — including a reasonable attorneys' fee — by virtue of the following provision (General Provision #58) in the Libby Dam contract here involved:

> "The Government reserves the right to direct the Contractor, and the Contractor in turn, shall reserve the right to direct all sub-contractors to take all necessary action to contest the validity of these fees (of the Act) and the contract price shall be equitably adjusted to cover the cost of such action, including reasonable attorneys' fees."

12. That the Federal Government has caused the following term to be inserted in the contract here in question:

> "The Act (citation) allows the license fee based on gross receipts to be used as a credit on: (1) the Contractor's corporation license tax (citation) or on Contractor's income tax (citation), depending upon the type of tax the Contractor (or subcontractor) is required to pay under the laws of the State of Montana; and (2) personal property taxes paid in Montana on personal property of the Contractor (or subcontractor) which is used in the business of the Contractor and is located within the State. THE CONTRACTOR, and, in turn, THE SUB-

CONTRACTOR WILL NOT TAKE ADVANTAGE OF THESE CREDITS." (emphasis supplied)

13. That the tax in question is applied to both prime contractors and sub-contractors, and works the same for each on any particular job. That it is the sub-contractor's bid which has a direct impact on determining the ultimate contract price paid by the property owner. That the 1% gross-receipts tax is a near or complete wash item as to sub-contractors just as it is with prime contractors and is not a measurable or significant item or consideration by the sub-contractors in determining and formulating their bids. That any impact through the sub-contractor on the Federal Government of the tax here in question is indirect and insubstantial and is not direct or consequential. That although on any particular job there may be a "pyramiding" of the inconsequentialities of the impact of the Act throughout a heirarchy of a prime plus a series of sub-contractors, the totality of such inconsequentialities is also inconsequential and indirect and is not direct or of consequence. Ten times zero is zero.

14. That there is a substantial and real difference between public and private contracts and between contractors performing public contracts (public contractors). That public contracts necessarily pertain to work on public property and involve the construction of structures for public use. That invariably public contracts must be bonded while private contractors need not be. Invariably public contractors must be supervised by a project engineer (or other official supervisor either state of federal) while private contractors need not be. As to public contracts the stability and durability of the projects (schools, dams, bridges, highways, stadiums, etc.) have direct impact on potentially great masses of the public while ordinarily

the quality of private construction has an impact only on a small portion of the public. An inexperienced contractor can bid or obtain a private job but not a public job. The classifications under the Act here in question between public and private contractors in no-wise involves or has a parallel between a classification of resident-vs-non-resident contractors. Thus, public contractors resident in Montana are treated exactly the same as non-resident public contractors. The same is true of private contractors either resident or non-resident. That the contractors have experienced no difficulty in recognizing the clear-cut and well-defined distinction between public works and private works and between contractors with public jobs and contractors with private jobs.

15. That the act in question has rendered the task of County Assessors in Montana in locating and fairly assessing personal property (heavy equipment of contractors) vastly more easy, efficient and fair. That the act also discourages unreasonable allocation of indirect costs (home office overhead and equipment rentals) to Montana projects by out-of-state contractors and so encourages a more fair determination of net income in Montana and payment of Montana income tax.

16. That the act in question has tended to equalize bidders at public bid-lettings in that before the act certain contractors (both in-state and out-of-state) were prone to "ignore" any impact of personal property taxes on equipment in Montana while other bidders offered bids that fully recognized the potential impact of such taxes. Furthermore, certain contractors were able to minimize Montana income tax by allocation of heavy home-office (out-of-state) overhead to a Montana project whereas other bidders would have to keep in mind when

bidding that Montana income taxes might well be incurred. That the act in question tends to very closely approximate the combination of both fair and realistic personal property plus income taxes and so promotes equality and fairness at public biddings.

17. That the tax is new and novel in Montana, and certain contractors initially were not aware of the credits (personal property and income tax) provided by the act and hence such credits were in part not claimed, and the residual fund with the State Board tended to grow. That there is also a certain amount of oversight or indifference by contractors in claiming refunds, and that also has tended to augment the tax residue with the State Board. Finally the incentives within the Act for disclosure of personal property and fair determination have not had a chance for full recognition and application in the scant four years since the enactment of the Act; but over the years to come will probably result in the Act's becoming a total or near-totally revenue enforcing (personal property and income tax) measure rather than revenue producing measure. That the present residue of tax with the State Board or State of Montana is not fairly representative of how the tax is likely to operate in the future years.

And from the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

1. That this Court has jurisdiction of the subject matter and of the parties.

2. That the gross receipts tax provided for by the Act is not actually a tax at all in the sense of being a separate and distinct revenue-producing measure but rather is a tax-enforcing measure operating on the

estimated tax withholding concept whereby estimates of Montana personal property plus estimated Montana income taxes are initially deposited with the State Board by the taxpayer (public contractor) as the 1% gross receipts tax, and then later refunded in whole or large part when proof of payment of Montana personal property taxes and income taxes is made.

3. That the tax is not directly or indirectly levied upon the Federal Government.

4. That any impact of the tax upon the Federal Government is neither direct nor substantial but, if it exists in any particular circumstance, is inconsequential, indirect, and remote. That the purpose of the act in nowise is to levy any tax of any kind or in any measure upon the Federal Government, and it does not do so.

5. That the tax is directly levied upon public contractors and is wholly paid by them, and no tax is paid by or withheld by the Federal Government.

6. That the tax is a revenue-enforcing rather than a revenue producing measure and operates to encourage fair and just payment of personal property and Montana income (individual or corporate) taxes.

7. That any provision of the Act pertaining to passing upon or determining the qualifications or professional competence, fitness or responsibility of public contractors is wholly inapplicable to public contractors performing Federal Contracts in Montana. That the public good is adequately protected by having federal supervisors supervise and police federal jobs. That the inspection, supervision and professional qualifications provisions of the act pertain only to public contractors performing jobs for the State of Montana or subdivisions thereof or other (Montana) public entities but not the

Federal Government. That since such regulatory provisions are not applicable to public contractors with Federal jobs, neither the State Board of Equalization or any member or employee thereof has any power or authority to interfere with, impede, hinder, delay, stop or otherwise affect the performance by a federal contractor of a federal project in Montana. That the Act goes not illegally interfere with the Federal Government's power to select contractors and schedule construction and does not conflict with Federal law and policy regulating Federal procurement; nor does it constitute a review by the State of Montana over Federal determination of responsibility and fitness of its contractors or sub-contractors.

8. That the Act does not apply to or in anywise control or affect the selection by the Federal Government of its contractors or the manner in which they perform their contracts.

9. That the Act is relevant to public contractors performing federal contracts only in that after such a contractor has been awarded a federal contract he shall obtain a license for revenue reporting and accounting purposes only. No license is required or shall be required of a bidder on a federal project.

10. That the purpose of the act is to encourage and enforce payment of personal property taxes and Montana income taxes; and, over a period of years as familiarity with its credit mechanisms becomes better known and better applied, such credits will serve to "wash out" or fully equalize and eliminate the "tax" for all practical purposes and with any remaining balance being reasonably allocated to administration expense. However, the Federal Government has elected to include in its federal contracts a provision (General Provi-

sion 58) which provides that its federal contractors in Montana will not take advantage of the very credits which tend to reduce the "tax" to a wash item. That this attempt by the Federal Government to cause the act to appear to be a revenue producing measure and to cause it to appear to have some measurable or substantial economic impact upon contracting property owners (and particularly the Federal Government) does not accord with the admonition of the Supreme Court of the United States in the Case of *James* -vs- *Dravo Contracting Co.*, 302 U.S. 134, to the effect that each Sovereign, whether state or federal, must adopt a workable and practical attitude toward the other in areas where taxing power of either could interfere to some remote and inconsequential degree with the operations of the other sovereign and that neither should operate as to the other with a "chip on its shoulder."

11. That upon the giving of full credit for payment of personal property and Montana income taxes the "tax is substantially or totally a wash item and there is no measurable or substantial difference in tax treatment of public -vs- private contractors in Montana by virtue of the act.

12. That if the act did levy a measurable and substantial tax upon public contractors in Montana not borne by or levied upon private contractors in Montana, the Act would not thereby be rendered invalid because there is a real and substantial difference between the classification of public -vs- private contractor. Such classification is reasonable and natural and is founded upon a just and rational basis, rule and distinction. Such classification is in nowise arbitrary, oppressive, capricious, illusory or fanciful. The tax imposed is uniform upon the same class of subjects. There are

valid and sufficient reasons both tax-wise and public policy-wise for the legislative recognition of the distinctive classes. That good and sufficient reason exists justifying the Legislature's decision not to tax or regulate private contractors.

13. That the act in question is not invalid or unconstitutional.

14. That the taxes levied upon the plaintiff and paid under protest by the plaintiff were not improperly, illegally or unlawfully levied or collected and the plaintiff is not entitled to repayment of the same.

15. That the Act in question does not contravene the constitution or the laws of the United States of America.

16. That the Act in question does not contravene or violate the constitution or laws of the State of Montana.

17. That the Act does not discriminate against the plaintiff.

18. That the Act does not discriminate against or deny due process of law to the United States of America or its agencies or instrumentalities or those with whom it does business.

19. That the Act does not violate or infringe upon the immunity of the Federal Government or its instruments (including Plaintiff) from state (Montana) control in the performance of their functions.

20. That said Act is valid and enforceable and the regulations issued by the Board and being administered by it are likewise valid and enforceable and were properly adopted pursuant to Legislative authority and properly interpret and apply the Legislative intent as to said Act.

21. That the plaintiff is not entitled to any of its

prayers for relief, and defendants are entitled to judgment for their costs herein expended.

Let Judgment Be Accordingly Entered.

DATED this 22 day of November, 1971

VICTOR H. FALLS
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and KEITH COLBO, as Director of Revenue of and for the State of Montana, and his successors in office,

Defendants.

AMENDED COMPLAINT

Comes now the plaintiff, United States of America, by its attorney, Otis L. Packwood, United States Attorney for the District of Montana, and complains and alleges as follows:

THE ACTION, JURISDICTION AND PARTIES

1. This is a civil action instituted by the United States of America for the purpose of obtaining from the Court (1) a declaratory judgment ordering and adjudging that the Federal Constitution and the laws of the United States prohibit the imposition, application or enforcement of the provisions of the Montana Public Contractor's Licensing, Regulation, and Gross Receipts Tax Act, Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended, and the rules and regulations promulgated thereunder (hereinafter sometimes referred to as the "Montana Act and

regulations") relating to both (a) the taxation and (b) the licensing and regulation of public contractors or all public construction work performed in the State of Montana, as to the United States of America, its contractors, subcontractors, or those with whom it deals, (2) a permanent injunction against the defendants and those in concert with them from imposing, applying or enforcing both (a) the taxing provisions and (b) the licensing and regulatory provisions of the Montana Act against the United States of America, its contractors, subcontractors, or those with whom it deals, (3) continued retention in escrow of funds illegally collected from the United States of America, its contractors, or subcontractors, under the Montana Act during the pendency of this action to insure, in the event the plaintiff prevails, that proper refunds shall be made to the United States of America, including interest (comensurate with the spirit of this Court's May 3, 1973 Restraining Order), and (4) a refund of taxes erroneously or illegally imposed or collected from the United States of America, its contractors, subcontractors, or those with whom it deals under the Montana Act.

2. This action has been authorized and requested by a delegate of the Secretary of the Army, a department of the plaintiff, United States of America, and is brought under the direction of the Attorney General of the United States, to protect the pecuniary interests and sovereign rights of the United States.

3. Jurisdiction of this action is conferred upon this Court by the provisions of Sections 1345 and 2201 of Title 28, United States Code, for the reason that this is a civil action brought by the United States to obtain a declaratory judgment from this Court respecting the legal rights of the United States and the provisions of Section 1331 of Title 28, United States Code, for the reason that

the amount in controversy exceeds ten thousand dollars ($10,000), exclusive of interest and costs, and this is a suit arising under the Constitution and laws of the United States.

4. An actual controversy, as is more fully described below, has arisen and now exists between the United States of America and those with whom it contracts on one hand and the defendants on the other hand concerning their respective rights and duties.

5. A three-judge Court is properly invoked in this action pursuant to the provisions of Section 2281 of Title 28, U.S.C., because the plaintiff is attacking a Montana State statute and its application on grounds of unconstitutionality.

6. Plaintiff, United States of America, is a corporate sovereign and body politic.

7. The defendant, State of Montana, is a body politic and corporate sovereign and is joined as a defendant in this action because the action involves an attack on the constitutionality of a State statute and its application. The defendant, Department of Revenue of the State of Montana, is the agency responsible for the administration and enforcement of tax laws, including the Montana Act and regulations (and is the defendant properly substituted for the State Board of Equalization). Defendant Keith Colbo is the Director of Revenue for the State of Montana and is joined herein in his official capacity (and is the defendant properly substituted for the individual members of the State Board of Equalization).

THE ILLEGAL INTERFERENCE AND ILLEGAL REGULATION BY DEFENDANTS

8. In the performance of its governmental functions, plaintiff, United States of America, has entered into, prior to and since enactment of the Montana Act, and will enter contracts with, and has employed and will employ contractors and subcontractors to perform construction work in the State of Montana to erect, build, excavate, alter or repair buildings, structures, installations, or facilities for itself, its agencies and instrumentalities, including its Department of the Army.

9. Congress, in the Armed Services Procurement Act of 1947 (Title 10, U.S.C., Section 2301, et seq.) and United States Government Procurement Regulations (32 CFR Sec. 1.100 et seq.) both provide for federal regulation or federal standards to determine and insure the fitness, qualifications, responsibility and reliability of persons, companies, or corporations performing construction work for the United States Government, including those contractors or subcontractors under contract with the United States Government in Montana.

10. The language of the Montana Act and regulations, at all times pertinent hereto, has provided, and still provides that it is unlawful for a person to engage in the business or act in the capacity of a public contractor in Montana without having a Public Contractor's License, without paying a License Fee of $10 to $200 and without paying Gross Receipts Taxes measured by 1% of the value of all public construction contracts.

11. The Montana Supreme Court in the Case of *Peter Kiewit Sons' Co* v. *State Board of Equalization*, 30 Mont. 32, 505 P. 2d 102 (1973), held that the

regulatory provisions of the Montana Act do not apply to contractors or subcontractors performing work for the Federal Government.

12. Despite the holding in the *Kiewit* case, the licensing and regulatory provisions of the Montana Act and regulations still create no exemption for federal contractors and their language and their enforcement interferes with or regulates such federal contractors, in that in order (a) to submit bids or proposals (b) to enter into contracts with or (c) to perform or continue their contractual obligations with the Federal Government, contractors must still (i) obtain and maintain a Public Contractor's License under the Montana Act and regulations and accordingly, such contractor must be subject to licensing requirements and regulations, meet standards or grounds to determine fitness and responsibility which are similar in part to the hereinbefore described grounds for finding responsibility and fitness under the hereinbefore federal statute and regulations, (ii) pay a license fee ($10 to $200), and (iii) pay an additional license fee or gross receipts tax currently measured by 1% of the gross receipts derived from the value of construction contracts with the Federal Government.

13. Furthermore, once granted, the defendants have authority to suspend such federal contractor's License (Section 84-3510 R.C.M., 1947, as amended) thereby effectively either preventing such federal contractor from performing his federal contract or placing him in violation of State law if he acts in the capacity of a public contractor without a License.

14. There is no authority under any Montana statute or act to impose or enforce the same or similar regulatory or licensing provisions found in the Montana

Act and regulations against contractors or subcontractors who perform construction work or are under contract with private persons, private businesses, private corporations.

15. The licensing and regulatory provisions of the Montana Act are erroneous, invalid and without legal force or effect because they are in conflict with the laws and Constitution of the United States of America in that they:

(a) Illegally violate the immunity of the Federal Government and its instruments from state control in the performance of their functions.
(b) Illegally interfere with the Federal Government's power to select contractors and schedule construction and are in conflict with Federal procurement law and regulations.
(c) Illegally frustrate the federal policy of selecting the lowest possible bidder.
(d) Illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

THE UNCONSTITUTIONAL TAXATION

16. The taxing provisions of the Montana Act and regulations provide that a Gross Receipts tax must be paid at the present rate of 1% of all receipts derived from public construction contracts performed in the State of Montana, including those receipts derived from performing construction contracts for the Federal Government.

17. The taxing provisions of the Montana Act and regulations also provide for certain refunds for personal property taxes paid in Montana and credits for income

and corporate income taxes paid to the State of Montana (Section 84-3514, R.C.M., 1947, as amended). Such refunds and credits are available only up to the amount of 1% Gross Receipts tax paid by the public contractor or subcontractor.

18. Provisions of construction contracts in Montana between plaintiff and its contractors and subcontractors require, and have required the inclusion in the contract price of all Montana taxes, including the 1% Gross Receipts tax, and in accordance therewith, the United States has made, or must make, reimbursement to said contractors and subcontractors for the amounts remitted by them to defendants. Accordingly, plaintiff has incurred and will continue to incur liability for the 1% Gross Receipts tax imposed upon and collected by defendants from federal contractors and subcontractors under authority of the Montana Act and regulations.

19. Department of the Army contracts for construction in Montana since 1971 have insisted that federal contractors and subcontractors take advantage of all refunds and credits provided for under the Montana Act.

20. No provision is provided in any Montana statute or regulation to refund the excess of Gross Receipts taxes collected over and above all such available refunds and credits to public contractors, if an excess exists either on an annual or completed contract basis. The taxing provisions of the Montana Act make no provisions for refunds for personal property taxes paid in other states or provide no credits for income taxes or corporate income taxes paid to other states. Accordingly, the system of refunds and credits places a heavier tax burden on out-of-state contractors than on Montana contractors.

21. Defendants have collected an excess from public contractors, including federal contractors and subcontractors, over and above all refunds and credits of approximately four and one-half million dollars ($4,500,000) since the taxing provisions of the Montana Act became effective on or about January 1, 1967.

22. The excess of revenue collected over and above refunds and credits taken is currently increasing making the the 1% Gross Receipts tax a revenue-raising measure rather than a revenue-enforcing measure, i.e., there is not a "wash-out" of the 1% Gross Receipts tax (i.e., the net 1% Gross Receipts tax paid does not equal zero) after all available refunds and credits are taken for many public contractors, including federal contractors.

23. There is no authority under any Montana statute or act to impose or enforce the same or a similar tax provisions found in the Montana Act and regulations against construction contracts performed for private or corporate landowners nor do contractors or subcontractors pay any Gross Receipts taxes for performing construction contracts with private persons, private businesses or private corporations as they do for performing public construction contracts. Accordingly, the cumulative Montana taxes paid by contractors who perform construction contracts for the Government can never be less than but can be greater than the cumulative Montana taxes paid by contractors performing construction contracts for private parties.

24. The taxing provisions of the Montana Act and regulations are erroneous, invalid and without legal force or effect because both the language and the operation of the Act violates the Constitution and laws of the United States in that they:

(a) Illegally discriminate against the plaintiff, United

States, and its agencies and instrumentalities, and those with whom the United States does business;

(b) illegally force the Federal Government to pay more for its construction than does a private person, business or corporation;

(c) illegally imposes a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects; and

(d) illegally provide a system of refunds and credits that discriminate against an out-of-state contractor in favor of a Montana contractor and place a heavier tax burden on such out-of-state contractor.

25. Under the terms of agreements between the Government and its contractors and its subcontractors, the Government is entitled to the benefit of any recovery of any part of any said 1% Gross Receipts tax payments imposed, remitted to and received by defendants under authority of the taxing provisions of the Montana Act and regulations.

26. It is necessary to continue retention of the portion of the funds collected from the Federal Government or its contractors under authority of the Montana Act and regulations during the pendency of this action to insure that proper refunds can be made by the defendants in the event that the plaintiff prefails.

WHEREFORE, plaintiff, United States of America, prays that this Court enter an order granting:

1. A declaratory judgment, ordering and adjudging that the Federal Constitution and laws of the United States are in conflict with and thereby prohibit the statutory scheme, the imposition, application and enforcement of both (a) the taxation provisions and (b) the licensing and regulatory provisions of the Montana Public Contractor's Licensing, Regulation, and Gross

Receipts Tax Act, Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended, and the rules and regulations promulgated thereunder, against the United States, its contractors and its subcontractors because:

(A) The Taxation Provisions

(1) illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business in violation of the Supremacy Clause, Article VI, Clause 2, and the Fourteenth Amendment;

(2) illegally impose a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects in violation of the Fourteenth Amendment;

(3) illegally force the United States of America to pay more for its construction than does a private party or corporation in violation of the Supremacy Clause, Art. VI, Cl. 2;

(4) the statutory scheme and the operation of the system of personal property tax refunds and income and corporate tax credits, illegally place a heavier tax burden on an out-of-state contractor than a Montana contractor in violation of both the Commerce Clause, Art. I, Sec. 8, Cl. 2 and Supremacy Clause, Art. VI, Cl. 2; and

(5) the system of refunds and credits illegally interferes with the Federal Government's free choice to choose its contractors and frustrates the policy of choosing the lowest bidder in violation of federal procurement law and the Supremacy Clause, Art. IV, Cl. 2.

(B) The Licensing and the Regulatory Provisions

(1) illegally interfere with the Federal Government's power to select contractors and schedule construction, and are in conflict with the Supremacy Clause, and Federal law and policy regulating Federal construction and procurement;

(2) illegally violate the immunity of the Federal Government and its instruments from state control in the performance of their functions;

(3) illegally frustrate the Federal policy of selecting the lowest possible bidder; and

(4) illegally constitute a review by the State of Montana over the Federal determination of responsibility and fitness of its contractors and subcontractors.

2. In the alternative, if this Court finds no unconstitutional discrimination or violation of the Commerce Clause, a declaratory judgment, ordering and adjudging that the taxing provisions of the Montana Act and regulations were intended by the Montana legislature as a revenue-enforcing measure, were intended to "wash-out" and, accordingly, each year after all refunds and credits are taken by a public contractor or at the termination of each contract, the defendants must refund any excess Gross Receipts taxes collected under the Montana Act.

3. A permanent injunction that prohibits defendants and all persons acting in concert with them, from applying both (a) the taxing provisions and (b) the licensing and regulatory provisions of the Montana Act and regulations against the plaintiff, its contractors or subcontractors.

4. Continued retention of funds in escrow.

5. A refund of taxes, with interest, equal to all such amounts or sums as have been paid to defendants by plaintiff or its contractors or its subcontractors under

the Montana Act in excess of all refunds and credits taken.

6. Such other and further relief to the plaintiff as seems proper.

OTIS L. PACKWOOD
United States Attorney

OF COUNSEL:
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General Litigation Section
Tax Division

STEPHEN G. FUERTH, Asst. Chief
General Litigation Section
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Washington, D. C. 20530
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Planitiff

-vs-

STATE OF MONTANA; Department of Revenue of the State of Montana; and W. A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,

Defendants.

ANSWER

CONE NOW the Defendants, STATE OF MONTANA and the Department of Revenue of the State of Montana and its Director, by their attorneys and answer the Plaintiff's Amended Complaint on file as follows:

I.

The Defendants agree that the reasons listed in paragraph "1" thereof are apparently why the lawsuit was instituted by Plaintiff, although the Defendants deny the validity of the reasons stated and the allegations purportedly supporting such reasons.

II.

Answering the allegations of paragraph "2." thereof, Defendants deny having sufficient knowledge or information to form a belief as to the truth thereof and therefore deny the same.

III.

Answering the allegations of paragraph "3." thereof, Defendants admit that Section 1345 of Title 28 USCA confers jurisdiction on the Federal District Courts for suits commenced by the United States. Deny as to Section 1331, Title 28 that the Montana Act in question levies any tax directly on the United States or that an amount in controversy in excess of $10,000.00 is here involved as to these litigants. Admit that Section 2201, Title 28, USCA creates a declaratory judgment remedy for litigants as to whom a court has jurisdiction.

IV.

Admit the allegations of paragraphs "4." through "7." except that in paragraph "7." the Director of Revenue is not Keith Colbo but rather W. A. Groff.

V.

Admit the allegations of paragraphs "8." and "9." thereof.

VI.

Answering the allegations of paragraph "10." thereof, Defendants deny that the Montana Act in question as twice construed by the Supreme Court of the State of Montana can require the licensing of any public contractor engaged in a federal project for any purpose whatsoever as described in paragraph "9." of Plaintiff's amended complaint (fitness, qualifications, responsibility or reliability) and as to such public contractor engaged in a federal project the act in question pertains to revenue only and any licensing is solely for the purpose of implementing the orderly levy and collection of license tax revenue. Deny each and every other allegation contained in said paragraph.

VII.

Admit the allegations of paragraph "11."

VIII

Deny the allegations of paragraph "12." thereof and in that regard reallege paragraph "VI" above in this Answer. Defendants further allege that since the second affirmation by the Montana Supreme Court in February, 1975 of the act in question the Defendant Department of Revenue has scheduled hearings directed at revising and updating the regulations pertinent to said Act, and Plaintiff has been advised of such hearings and been invited to participate and aid in the elimination of any provision heretofore contended by the Plaintiff to justify concern as to the exercise by the Defendants of control over the Plaintiff's selection and control of its contractors.

IX

Deny the allegations of paragraph "13." thereof and in that regard reallege paragraph "VI" above in this Answer.

X

Admit the allegations of paragraph "14."

XI

Deny the allegations of paragraph "15."

XII

Answering the allegations of paragraph "16." thereof, Defendants admit that a 1% gross receipts tax is levied upon all public contractors whether located within or without the State of Montana; deny any inference from the Plaintiff's pleading that said tax is levied directly on the United States or that any economic impact on the United States is substantial.

XIII

Admit the allegations of paragraph "17."

XIV

Deny the allegations of paragraph "18." thereof.

XV

Answering the allegations of paragraph "19." thereof, Defendants deny having sufficient knowledge or information to form a belief as to the same and therefore deny the same.

XVI

Answering the allegations of paragraph "20." thereof, Defendants admit that there is no provision for refund of the excess, if any, of gross receipts taxes above the credits referred to by Plaintiff in paragraph "17." of its Amended Complaint. Admit that the Act makes no provision for "refunds" of personal property taxes paid to some other jurisdiction. Allege that Montana contractors doing business out of state incur various types of taxes in such jurisdictions— e.g. sales taxes; personal property taxes; income taxes; use taxes, etc., for which the Montana act provides no credit or rebate. Deny that the system of refunds and credits places a heavier tax burden on out-of-state contractors than on Montana contractors.

XVII

Admit the allegations of paragraph "21." thereof.

XVIII

Answering the allegations of paragraph "22." thereof, Defendants deny that the revenue collected on the contractors gross receipts tax is currently increasing; admit that the tax has not operated as a complete washout. Admit that said Act is operating in part as a revenue

enforcing measure as to personal property and income taxes and in part as a revenue measure the economic impact of which on the Federal Government is neither direct nor substantial.

XIX

Answering the allegations of paragraph "23." thereof, Defendants admit that the classification under the Act differentiates between public contractors and private contractors and that the 1% gross receipts tax applies to public contractors and does not apply to private contractors. Deny each and every other allegation contained in said paragraph.

XX

Deny the allegations of paragraph "24." thereof.

XXI

Deny the relevance of paragraph "25.". Deny that in drafting its contracts the Plaintiff was under any requirement whatsoever to single out the Montana Gross Receipts Tax if no such action is taken by the Plaintiff as to the myriad other taxes and expenses of operation—including sales taxes where applicable—for which provision may or may not be made by an interested bidder on a federal project.

XXII

Deny the allegations of paragraph "26."

XXIII

Deny each and every allegation contained in said Amended Complaint and not hereinbefore specifically admitted.

WHEREFORE, Defendants having fully answered pray that Plaintiff takes nothing by virtue of its

Amended Complaint and that the Defendants have judgment for their costs herein expended.

DATED this 17th day of March, 1975.

ROBERT L. WOODAHL, Attorney General of the State of Montana;
JAMES SENESCHAL, Chief Counsel, Department of Revenue, State of Montana
TERRY B. COSGROVE and ROBERT A. POORE, Special Assistant Attorneys General

By Terry B. Cosgrove
Suite 400, Silver Bow Block
Butte, Montana 59701

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MONTANA, et al.,

Defendant.

PLAINTIFF'S ANSWERS AND OBJECTION TO DEFENDANTS' REQUEST FOR ADMISSIONS AND INTERROGATORIES

Now comes the plaintiff, United States of America, by its undersigned attorneys, and submits answers and objections to defendants' Request for Admissions and Interrogatories as follows:

REQUEST No. 69:

Please admit each of the following Requests pertinent to the State of Montana case of *Kiewit* v *The State Board, et al.*, 161 Mont. 140, and as to any Request which is denied, please explain in exact detail the facts justifying such denial:

(a) That the United States required that the lawsuit be filed by Peter Kiewit.

(b) That the United States reviewed and approved the complaint.

(c) That the United States paid the attorneys-fees and costs.

(d) That the United States directed the appeal from the State District Court to the Supreme Court of Montana.

(e) That the United States appeared as amicus curiae and submitted a brief and participated in the oral argument.

(f) That the real party in interest in said state litigation was the United States of America.

(g) That the United States directed the filing of a Notice of Appeal to the Supreme Court of the United States.

(h) That the United States paid all legal fees pertinent to the filing of such Notice of Appeal.

(i) That the United States was prepared to pay all costs of appeal to the United States Supreme Court, including attorneys' fees.

(j) That the Solicitor General of the United States (Erwin N. Griswold) in effect negated the United States Supreme Court Appeal.

(k) That the United States had the power through Peter Kiewit to raise any issue the United States desired to be raised in the State Court litigation.

(l) That all issues being raised in this litigation could have been raised and litigated in the State Court.

(m) That all issues being raised in this litigation could have been raised and litigated the state court.

ANSWER TO REQUEST No. 69.

The plaintiff admits and denies the following subparagraphs to Request No. 69:

(a) Admits

(b) Admits

(c) Admits
(d) Admits
(e) Admits
(f) Admits
(g) Admits
(h) Admits
(i) Admits
(j) Admits
(k) Denies
(l) Denies
(m) Denies

With respect to Interrogatory No. 69, subparagraph (k), (l) and (m), see Answer No. 8 and plaintiff's Memorandum of Law:

(1) In Further Opposition to Defendants' Motion to Dismiss;

(2) In Opposition to defendants' Motion for Summary Judgment Based on Res Judicata or Collateral Estoppel; and

(3) In Support of Its Cross Motion for Summary Judgment.

Dated this 2nd day of October, 1975

SCOTT P. CRAMPTON
Assistant Attorney General
U. S. Department of Justice
Tax Division
Washington, D. C. 20530

JOHN J. McCARTHY
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OF COUNSEL:

KEITH L. BURROWS
United States Attorney
District of Montana

(All Requests and Answers other than No. 69 Omitted in Printing)

PLAINTIFF'S EXHIBIT No. 1

Standard Form 23 January 1961 Edition General Services Administration Fed. Proc. Reg. (41 CFR) 1-16.401 **CONSTRUCTION CONTRACT** *(See instructions on reverse)*	Contract No. DACW67-74-C-9801 Date of Contract 1973 Aug. 03
Name and Address of Contractor SLETTEN CONSTRUCTION CO. 1301 10th Avenue North Great Falls, Montana 59403	Check Appropriate Box ☐ Individual ☐ Partnership ☐ Joint Venture ☒ Corporation, incorporated in the State of Montana

Department or Agency
DEPARTMENT OF THE ARMY
Seattle District, Corps of Engineers
1518 Alaskan Way South, Seattle, Washington 98134

Contract for *(Work to be performed)*
Phase I
United States Post Office

Place
Billings, Montana

Contract Price *(Express in words and figures)*
One Million, Eighty-seven Thousand, Five Hundred Fifty-three and No Hundredths Dollars ($1,087,553.00)

(Only paragraphs 35, 44 and 73 included, remaining portions of exhibit omitted in printing).

35. FEDERAL, STATE, AND LOCAL TAXES (1971 NOV)

(a) Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

(b) Nevertheless, with respect to any Federal excise tax or duty on the transactions or property covered by

this contract, if a statute, court decision, written ruling, or regulation takes effect after the contract date, and—

(1) results in the Contractor being required to pay or bear the burden of any such Federal excise tax or duty or increase in the rate thereof which would not otherwise have been payable on such transactions or property, the contract price shall be increased by the amount of such tax or duty or rate increase, *provided* the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price as a contingency reserve or otherwise; or

(2) results in the Contractor not being required to pay or bear the burden of, or in his obtaining a refund or drawback of, any such Federal excise tax or duty which would otherwise have been payable on such transactions or property or which was the basis of an increase in the contract price, the contract price shall be decreased by the amount of the relief, refund, or drawback, or that amount shall be paid to the Government, as directed by the Contracting Officer. The contract price shall be similarly decreased if the Contractor, through his fault or negligence or his failure to follow instructions of the Contracting Officer, is required to pay or bear the burden of, or does not obtain a refund or drawback of, any such Federal excise tax or duty.

(c) Paragraph (b) above shall not be applicable to social security taxes or to any other employment tax.

(d) No adjustment of less than $100 shall be made in the contract price pursuant to paragraph (b) above.

(e) As used in paragraph (b) above, the term "contract date" means the date set for bid opening, or if this is a negotiated contract, the contract date. As to additional

supplies or services procured by modification to this contract, the term "contract date" means the date of such modification.

(f) Unless there does not exist any reasonable basis to sustain an exemption, the Government upon the request of the Contractor shall, without further liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax; *provided* that, evidence appropriate to establish exemption from any Federal excise tax or duty which may give rise to either an increase or decrease in the contract price will be furnished only at the discretion of the Government.

(g) The Contractor shall promptly notify the Contracting Officer of matters which will result in either an increase or decrease in the contract price, and shall take action with respect thereto as directed by the Contracting Officer. (ASPR 7-103.10(a))

44. MODIFICATION PROPOSALS — PRICE BREAKDOWN (1968 APR)

The Contractor, in connection with any proposal he makes for a contract modification, shall furnish a price breakdown, itemized as required by the Contracting Officer. Unless otherwise directed, the breakdown shall be in sufficient detail to permit an analysis of all material, labor, equipment, subcontract, and overhead costs, as well as profit, and shall cover all work involved in the modification, whether such work was deleted, added or changed. Any amount claimed for subcontracts shall be supported by a similar price breakdown. In addition, if the proposal includes a time extension, a justification therefor shall also be furnished. The proposal, together with the price breakdown and time extension justification, shall be furnished by the date specified by the Contracting Officer. (ASPR 7-602.36)

73. MONTANA "PUBLIC CONTRACTORS" LICENSE FEES (1973 MAY)

Notwithstanding any other provisions of this contract:

(a) The contract price includes the license fees imposed by the State of Montana on "public contractors" under the provisions of Title 84, Chapter 35, Revised Codes of Montana, 1947, as amended, with respect to this contract and any subcontracts awarded hereunder.

(b) Section 84-3514, R.C.M., 1947, as amended, provides that personal property taxes paid in Montana on any personal property of the Contractor (or subcontractor) which is used in the business of the Contractor (or subcontractor) may be credited against the license fees (including the license fee based on gross receipts) required under Section 84-3505, R.C.M., 1947, as amended. The Contractor (or subcontractor) shall take advantage of this allowed credit by claiming a refund against the payments of the license fee based on gross receipts resulting from this contract for all personal property taxes paid on Contractor's (or subcontractor's) equipment used in the performance of this contract, or that amount of said personal property taxes as is required to reduce the gross receipts tax payment on this contract to zero.

(c) Nothing herein shall be construed to limit the right of the Contractor (or subcontractor) to apply for and receive credits on its Montana: (i) corporation license taxes (Title 84, Chapter 15, R.C.M., 1947, as amended) or (ii) income tax (Title 84, Chapter 49, R.C.M., 1947, as amended), depending upon the type of tax Contractor (or subcontractor) is required to pay under the laws of

the State of Montana, for payments of license fee based on gross receipts required under Section 84-3505, R.C.M., 1947, as amended, made under this contract; and the Government shall have no right or interest in the benefit from such credits which are allowed. Contractor, however, shall not apply for and receive credits on its corporation license tax or income tax until it has claimed all refunds available for personal property taxes paid with respect to the contract.

(d) The Government reserves the right to direct the Contractor, and the Contractor, in turn, shall reserve the right to direct all subcontractors to take all necessary action to contest the validity of these fees, and the contract price shall be equitably adjusted to cover the cost of such action, including reasonable attorneys' fees.

(c) If the Contractor, or a subcontractor, is not required to pay or bear the burden, or obtains a refund in whole or in part of these fees, the contract price shall be decreased by the amount of such relief or refund allocable to this contract, or that amount shall be paid to the Government as the Contracting Officer directs.

(f) The Contractor shall promptly notify the Contracting Officer of matters which may result in either an increase or decrease in the contract price. No adjustment of less than $100 is required to be made in the contract price pursuant to this clause.

(g) The Contractor shall maintain, and shall require all subcontractors to maintain, accurate records of all payments of the fees under this contract.

(h) The Contractor, and any subcontractors, will pay the license fees under written protest (as required by Title 84, Chapter 45, R.C.M., 1947, as amended), specifying the following grounds of protest including but not limited to:

(i) The said fees are invalid in that they unconstitutionally discriminate against the United States and persons dealing with the United States.

(ii) The Act imposing said fees is invalid in that it unconstitutionally interferes with the Federal Government's power to select contractors and schedule construction and is in conflict with Federal laws regulating procurement.

(iii) The said fees deny the taxpayer the right to Equal Protection of Law and Due Process of Law in that the classifications created by the Act enacting said fees are arbitrary and capricious, and discriminate against the United States and persons with whom it deals.

After such payment under protest and at the request of the Contracting Officer, the Contractor, and any subcontractors, or their legal representatives will bring an action in a court of competent jurisdiction against the officers to whom the license fees were paid, or against the county or municipality in whose behalf the license fees were collected, and the State Board of Equalization, which shall be served with summons and a copy of the complaint, to recover such fees. Such action to recover the fees shall be commenced and summons served within sixty (60) days after the date of payment of the same. Copies of the submission of payment under protest, summons and complaint filed will be promptly furnished to the Contracting Officer.

The Contracting Officer will not direct the Contractor, or any subcontractor, to bring an action to recover such fees where the amount of the contract or subcontract concerned is under $20,000, or where the incremental payments of such fees for any two-month period are less than $200.

PLAINTIFF'S EXHIBIT 2

D. Cost	75,000
I. Cost	20,000
Profit	5,000
1% Tax	1,000
	101,000

PLAINTIFF'S EXHIBIT 11

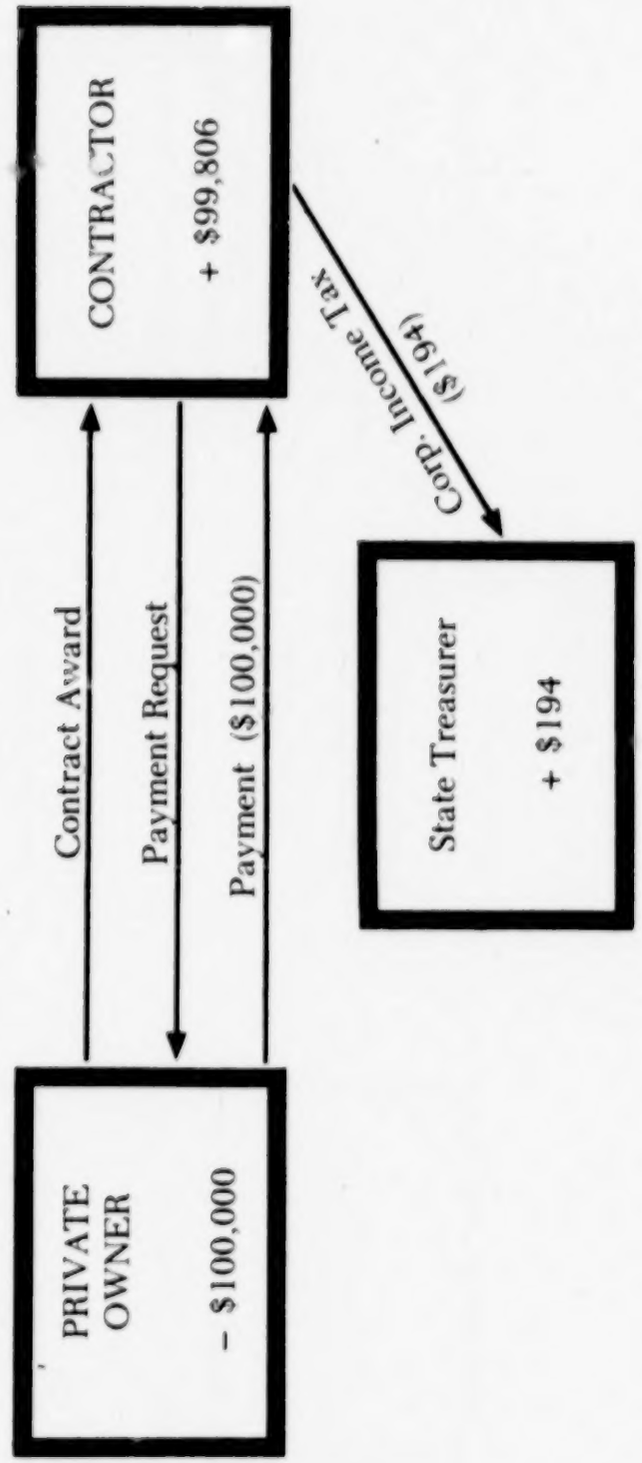
U. S. & Other Than State Government Agency		State Government		Private Owner	
Direct Costs	$75,000.00	Direct Costs	$75,000.00	Direct Costs	$75,000.00
Indirect Costs	20,000.00	Indirect Costs	20,000.00	Indirect Costs	20,000.00
Plus Profit	5,000.00	Plus Profit	5,000.00	Plus Profit	5,000.00
	$100,000.00		$100,000.00		$100,000.00
Montana Gross Receipts Tax 1%	1,000.00	Montana Gross Receipts Tax 1%	1,000.00	Final Cost to Owner	$100,000.00
Award Cost	$101,000.00	Award Cost	$101,000.00	Difference State—	$346.00
				U. S. non-state—	$654.00
Personal Property Tax Refund	$ 346.00	Personal Property Tax Refund	$ 346.00		
Corporate Income Tax Credit	194.00	Corporate Income Tax Credit	194.00		
Unrefunded Tax Balance	460.00	Unrefunded Tax Balance	460.00		
Total 1% Tax	$1,000.00	Total 1% Tax	$1,000.00		

PLAINTIFF'S EXHIBIT 11 — (Continued)

U. S. & Other Than State Government Agency	State Government
1. U. S. gets back the $346.00 pp tax refund from contractor.	1. Contractor gets back the $346.00 pp tax refund and keeps it.
2. Contractor gets the $194.00 corp. income tax credit. At this time the State Treasurer would transfer this amount from the 1% tax fund to the general fund.	2. Contractor gets the $194.00 corp. income tax credit. At this time the State Treasurer then transfers this amount from the 1% tax fund to the general fund.
3. The unrefunded tax balance of $460.00 stays in the state 1% tax fund. Eventual transfer to the general fund.	3. The unrefunded tax balance of $460.00 stays in the state 1% tax fund. Eventual transfer to the general fund.
Final Cost to the Awarding Agency $100,654.00	Final Cost to the Awarding Agency $100,346.00
	Difference $ 346.00

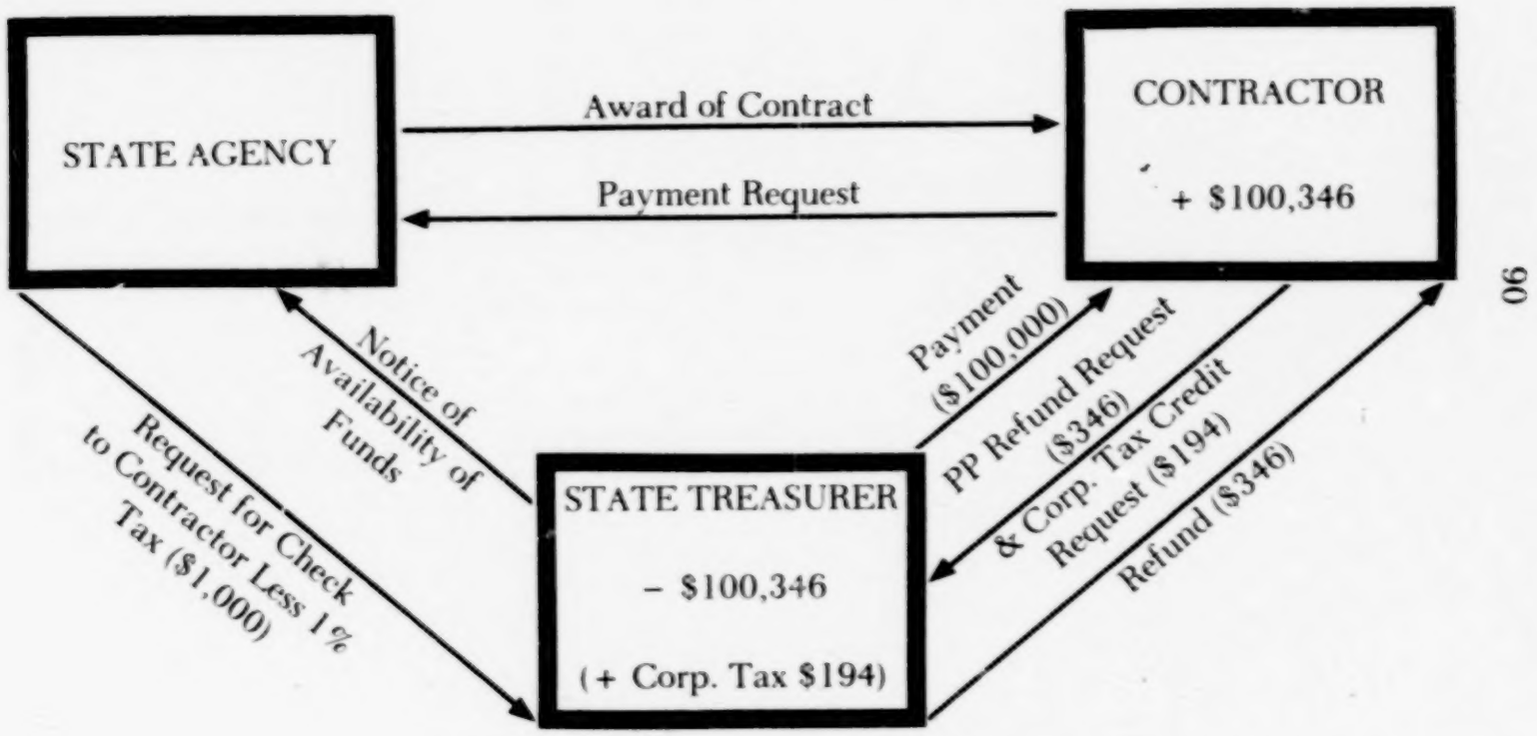
PLAINTIFF'S EXHIBIT 12

PRIVATE OWNER



PLAINTIFF'S EXHIBIT 13

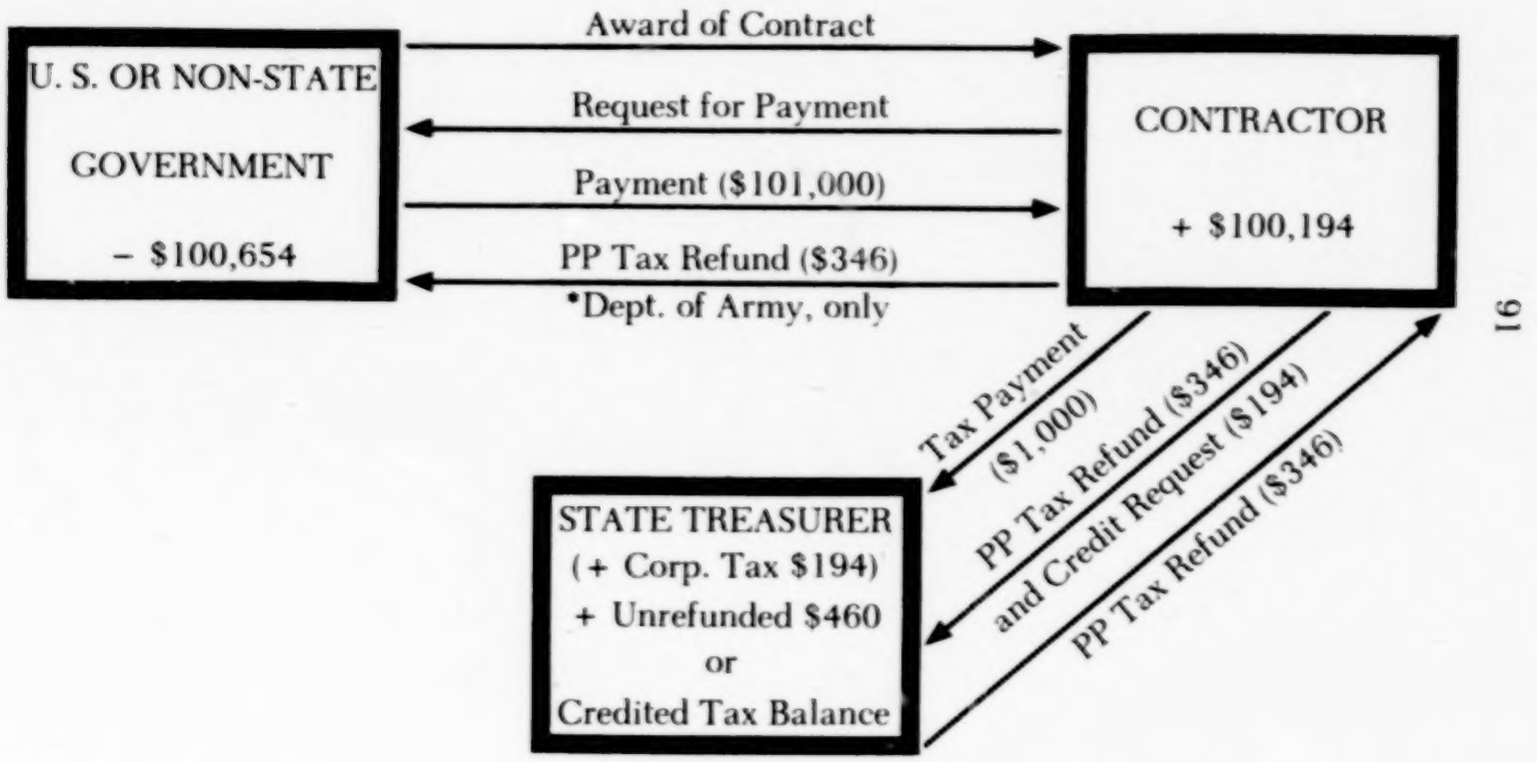
STATE CONTRACTS



90

PLAINTIFF'S EXHIBIT 14

U. S. & NON-STATE GOVERNMENTS



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EXCERPTS OF OFFICIAL TRANSCRIPT OF PROCEEDINGS HELD MARCH 30th, 31st and APRIL 1st, 1976, MISSOULA, MONTANA

(Tr. 8)

Direct Examination of MERRILL A. MORAN by Charles Stratton

Called as a witness, duly sworn, testified as follows: (Tr. 9)

Q. Could you state your name for the record? A. Merrill A. Moran.

Q. And Your address? A. 3600 6th Ave. South, Great Falls, Montana.

Q. Your occupation? A. Secretary-treasurer, Sletton Construction Company.

Q. And where is Sletton Construction Company located? A. The main office is in Great Falls, Montana.

Q. Could you summarize for us, Mr. Moran, your training or education above high school level? A. I attended the University of Oregon and graduated from the College of Great Falls with a degree in business administration.

Q. Are you a C.P.A.? A. Yes, I am a Certified Public Accountant.

Q. And have you ever practiced? A. Yes, I practiced public accountancy for 12 years prior to joining the Sletton Construction Company.

Q. And you are presently now the secretary-treasurer of Sletton Construction Company? A. Yes.

Q. And could you describe your function as treasur-

er? Some of the duties that you perform? A. Basically I am the accountant-office manager for the

(Tr.10)

company. I perform all comptroller-type duties —

MR. COSGROVE: Your Honor, I'm having a hard time hearing the witness. Could he speak up?

THE COURT: Speak up a little, if you can.

THE WITNESS: All right.

BY MR. STRATTON: How long have you been in that position? A. Since I joined the company in 1964.

Q. And do you have any prior experience with regard to construction? A. Yes. I was Sletton Construction Company's auditor for approximately ten years before becoming associated with the company.

Q. And what is the nature of the work that Sletton Construction Company performs? A. We are a general contractor with an emphasis on commercial work, highway heavy work or highway work as restricted primarily to bridge building.

Q. And so would you explain what commercial work is? A. Well, commercial work is commonly called building but on a commercial basis. We do not engage in any house building so to speak. It's all a commercial--type building situation.

Q. Such as a post office or - A. Right. Office buildings, banks, etc.

(Tr.11)

Q. Hotels, motels? A. Correct.

Q. Do you now or have you ever reviewed cost data and financial records with regard to estimating on such construction projects? A. Yes.

Q. Are you familiar with bidding or estimating on construction projects in Montana? A. Yes.

Q. Are you familiar with how a bid or estimate for a construction project in Montana is arrived at? A. Yes.

Q. Pertinent to your experience with Sletton Construction Company could you describe to the court how an estimate is prepared on a construction project in Montana? A. Well, the preparation of an estimate I think is in a series of steps. First, we obtain a set of plans and specifications from the owner or architect. We make a site visitation to determine conditions on the site. We review the specifications in detail. We make a quantity take off from the plans, price out those quantities then in terms of labor costs, material costs, equipment rental costs and if we plan on subcontracting portions of the contract we will solicit subcontract invitation bids, arrive at those low bids and then to that

(Tr.12)

we would add our field overhead costs and then on top of those costs would be added an element of office overhead and profit to arrive at our bid price.

Q. Could you define for the court what direct costs are on a construction project? What is meant by direct costs? A. Well, our definition of direct cost would include our direct labor, in other words, those workmen working directly on the project; the material costs, the cost of material going into the project; the cost of renting equipment to perform various phases of the work; the cost of any subcontracts that are issued along then with our field overhead. Now our field overhead generally includes superintendent's salary the utilities used on the field office, applicable taxes, applicable insurance, the cost of the bond and generally any cost that can be

attributed directly to the job we consider a direct job cost.

Q. I see. And could you describe what an indirect cost would be on a construction project? A. Well, indirect costs are basically our office overhead costs, which would include our office salaries, our utilities, etc. In other words, those costs that you cannot directly apportion to a project.

Q. Would those be termed general and administrative expenses? A. General and administrative expenses, yes.

(Tr. 13)

Q. This would be synonymous with indirect cost? A. Indirect cost, right.

Q. I see. Now is there another element in figuring your cost on a construction project such as profit? You have direct costs, indirect costs, and profit, is that right, in estimating a project or bidding on a project? A. Right. In arriving at a contract, at a bid price, yes.

Q. I see. Could you describe the element of profit? A. Well —

Q. Sometimes I've heard the term "margin" used as synonymous with profit. Do you define margin and profit the same way? A. Some people define them in the same terminology. We generally use the word "profit" simply to mean the excess over our cost is our profit.

Q. Does that include all of the money that you take into your pocket or does that include other factors, contingency factors, such as inflation or risk or items of that nature, corporate income taxes? A. Well, corporate income taxes are really a division of profit. We

would pay no corporate income tax if we didn't earn a profit.

Q. I see. Does your profit contain certain other contingency factors or are they included in indirect or direct costs?

(Tr. 14)

A. Well I'm not certain what you mean by contingency factors.

Q. Such as inflation? A. No. There is no element built into the profit that doesn't exist.

Q. You have built in the inflation then in your direct costs such as labor or materials if you can take inflation? A. Yes, if you are referring to a job that might be spread over a period of three years and we anticipate an increase in labor costs we'll say in that three year period of time, we would anticipate that increased cost in our bidding procedure. So we have an element of inflation built into our cost that generally holds true.

Q. Where do you, Mr. Moran, fit into this procedure of bidding on construction projects or estimating on construction projects? A. I am not an estimator. An estimator is a person trained to take off certain quantities etc. off of plans. I merely review the bidding procedures. In most cases I mechanically check all calculations, advise the bidding staff of certain costs that we know historically exist and ascertain those costs are included in the bid.

Q. Is it a fair statement that in the preparation and submission of a bid on a construction project your company expects to recover all costs involved plus an

(Tr. 15)

element of profit? A. Yes.

Q. Then you would take into account all known identifiable costs and figure them in the bid? A. Yes.

Q. Would you then pass those known identifiable costs on to the landowner? A. Yes.

Q. In your duties with Sletton Construction Company have you had experience with the operation of the one percent gross receipts tax imposed by the Gross Receipts Tax Act on public construction in Montana? A. Yes.

Q. Could you tell me how it is calculated, how the one percent gross receipts tax is calculated? A. Well, we add to our direct costs one percent of our bid price to cover the one percent gross receipts tax that we are going to have to pay.

Q. In other words the one percent gross receipts tax is imposed on gross revenues received by a construction contractor performing work for a public agency, a Government agency? A. Yes.

Q. Can this one percent tax be calculated with precision? A. Yes.

(Tr. 16)

Q. If your company were awarded a construction contract with the Federal Government for construction of, say, a United States Post Office, would your company be required to remit the one percent gross receipts tax to the State of Montana? A. Yes.

Q. Would that mean every time that you get a payment from the United States Government that you would have to remit one percent of that over to the State? A. Yes.

Q. Would the same hold true if you performed work for the State of Montana? A. The State of Montana

withholds the one percent rather than us remitting it to the State. In other words, the one percent is withheld from the monthly estimate by the State of Montana.

Q. So you never see that? A. We don't see it, no.

Q. Is the one percent gross receipt tax a known identifiable cost of performing the construction project for the Federal Government? A. Yes.

Q. So then at the time of submission of a bid to the Federal Government you would take into account the fact that the one percent gross receipts tax had to be paid to

(Tr. 17)

the State of Montana? A. Yes.

Q. Then you would add the one percent gross receipts tax to the Federal Government out of economic necessity; is that true? A. Yes.

Q. And you said you put them — you put it into your direct costs rather than indirect costs or profit? A. No, we consider it a direct cost.

Q. You testified that is so because it is a known identifiable cost? A. Correct.

Q. Now do you perform both construction for private individuals or private corporations as well as Governmental agencies in Montana? A. Yes.

Q. Do you add or figure the one percent gross receipts tax in bids for construction projects performed for private individuals or corporations, private corporations? A. No.

MR. STRATTON: At this time, Your Honor, I would like to introduce Plaintiff's Exhibit #1. Plaintiff's Exhibit #1 is listed in the pretrial order and has already been admitted in evidence.

THE COURT: Have you agreed upon its admissibility?

(Tr. 18)

MR. POORE: Yes.

THE COURT: Plaintiff's Exhibit 1 is admitted.

(Plaintiff's Exhibit #1 Received in Evidence)

BY MR. STRATTON: Q. Now I have in hand a document. Would you please look at it, Mr. Moran, and explain what it is to the court? A. This is a copy of a construction contract between Sletton Construction Company and the Department of Army Corps of Engineers for the construction of Phase I of the United States Post Office in Billings, Montana.

Q. And what is the amount of the contract? A. The contract was issued for $1,087,553.

Q. In connection with that specific job performed for the Federal Government in Montana did your company add the one percent gross receipts tax to their bid? A. Yes.

Q. Did the inclusion of that gross receipts tax result in a higher cost to the Federal Government?

MR. POORE: Objected to as calling for a conclusion of the witness. There's no foundation for such an opinion.

THE COURT: Overruled.

MR. STRATTON: Was that objection overruled?

THE COURT: Yes.

(Tr. 19)

BY MR. STRATTON: Q. You can answer the question. A. Yes.

Q. Now assuming that you are performing identical construction jobs under identical conditions in Montana, one for a private individual or corporation and one for a Governmental agency such as the United States. Would there be a difference in the bids? I believe you testified there would be in the one percent gross receipts tax. A. Yes.

Q. Would there be any other significant differences? A. Not as a cost to the owner.

Q. I see. What about bond costs? Would that be an increased cost to the owner? A. Normally all projects that we construct are bonded. It's a rare case where one isn't.

Q. Does that include projects for private corporations as well? A. Right.

Q. Corporations that might be listed on the New York State Stock Exchange? A. Yes.

Q. Mr. Moran, would your company bid less for a State project than for a Federal project? A. An identical project?

(Tr. 20)

Q. An identical project. A. No.

Q. Would the cost proposal be identical if the costs were identical in the projects if they were two identical projects, one for the State and one for the Federal Government? A. If the specifications were identical, I would say yes.

Q. Ok. Could you give an example of a project that you've built for the State recently? A. The Reserve Street Bridge here in Missoula, Montana was built for the Montana Highway Department.

Q. Did you also build the Missoula Field House? A. We built an addition to the Missoula Field House, yes.

Q. I see. So when you figured your bid for the State did you build in the one percent gross receipts tax or include the one percent gross receipts tax to the State? A. Yes.

Q. And under Section 42-2.14(2-s14010), which is a regulation, the State withholds the one percent gross receipts tax from any payment given to you? A. Yes.

Q. Now, Mr. Moran, I would like to refer back to the construction contract. I would like to look at some specific contract clauses concerning taxes in the document. Would you please refer to the special Montana tax clause?

(Tr. 21)

A. All right, I have it.

Q. Ok, could you read the title of that particular clause? A. "Montana 'Public Contractors' License Fees."

Q. Ok. I notice a beginning sub paragraph a. Could you read that for the record, please? A. "The contract price includes the license fees imposed by the State of Montana on 'public contractors' under the provisions of Title 84, Chapter 35, Revised Codes of Montana, 1947, as amended, with respect to this contract and any subcontracts awarded here under."

Q. Do you know why that particular clause is included in the contract? A. Merely to call to our attention that there is such a law, I believe.

Q. Now assuming that that contract provision were not there, would you include the one percent regardless? A. Yes.

Q. On a bid to the Federal Government? A. Yes.

Q. And you testified earlier that you do include the one percent gross receipts tax on a bid to the State Government. Do they have such a clause in their contracts? A. I don't believe they do.

(Tr. 23)

BY MR. STRATTON: Q. Mr. Moran, is there any provision in this Federal contract that requires you to put the one percent gross receipts tax in your bid?

MR. POORE: Same objection.

THE COURT: Overruled.

THE WITNESS: No.

(Tr. 25)

BY MR. STRATTON: Q. Now, Mr. Moran, I would like to

(Tr. 26)

refer you to Page 33 of a deposition. I believe it is "Deposition upon oral examination of Merrill A. Moran" taken November 20th, 1975 in Seattle, Washington. On Page 33 there is a question by Mr. Poore. Would you please read that question? A. "And with the knowledge at hand as an officer of your corporation, as an estimator and as a person involved in the bidding process with the knowledge at hand that you are going to have to pay over to the Federal Government the cash refunds that do come on any project pertinent to personal property taxes, it is perfectly obvious to me, and I'm sure controls your thinking, does it not, to crank in your original bid the full one percent tax?"

Q. How did you answer that question? A. My answer was "Correct."

Q. Reading over that question at this time, is that your answer? A. On careful examination of the structure of the sentence, the question is a little bit confusing. If the question meant to ask "Would you include the one percent property tax in your bid knowing that you are going to have to refund part of that tax to the Federal Government", I think my answer would have to be "No" because we include the one percent property tax primarily because it is a State law.

(Tr. 27)

Q. You mean the one percent gross receipts tax? A. The one percent gross receipts tax because it is a State law, not because we have to refund part of it to the Federal Government.

Q. But don't you take the fact that the Government receives refunds of personal property taxes into account when you bid on a Federal project? A. Do I take into account the fact that the Government receives personal property refunds from me?

Q. Yes. A. No. No, we do not. At the time of bidding we have no way of knowing for certain that we are going to receive a personal property tax refund on any particular project nor do we know for certain that we are even going to make a profit on the project. We couldn't take into account a refund we don't know exists.

Q. I see. Do you figure the cost of corporate license taxes in your bid to the Federal Government? A. In describing the bidding procedure I stated that we added an element of office overhead and profit to any bid and in so doing I think we are covering all of the costs that are involved, whether they are a direct cost or indirect cost. We don't, however, really consider a corporate income tax as an element of cost. If we do have a

profit, we consider that corporate income tax is a profit sharing
(Tr. 28)
with the Government agency.

Q. Would that apply to the State as well as the Federal Government? A. Correct.

Q. And in figuring your bid for a private corporation would that apply as well as far as the income taxes are concerned? A. Yes.

Q. Now concerning Government contracts, in your experience are there ever any changes from an initial bid that is submitted to the Federal Government, say, for instance on this job that you performed for the United States on the post office in Billings, Montana? Were there any changes or modifications to the contract? A. Yes, there were.

Q. And do you have to negotiate such changes or modifications to the contract with the Department of Army? A. Yes.

Q. Pursuant to those negotiations do you submit a detailed list of costs occasioned by the change orders? A. Yes, any changes.

Q. Does this list set out separately the one percent gross receipt tax? A. Yes.

(Tr. 32)

BY MR. STRATTON: Q. Mr. Moran, I have a hypothetical to try to explain the mechanics of how this tax works and how it relates to your bids. Assuming that you had a rental rate on equipment used on a construction project for the Federal Government, which included an element of the Montana personal property tax, and that averaged out to be one quarter of one per-

cent of the total cost of the construction project, is it true that prior to the one percent gross receipts tax you would have charged the United States one quarter of one percent for personal property taxes as a cost? A. Yes.

Q. Now the situation after enactment of the one percent tax. You testified that you charged the rental rate as well. The one quarter of one percent tax is still charged to the

(Tr. 33)

United States on construction projects; is that right? A. Yes.

Q. In addition you now charge the United States the one percent gross receipts tax in addition to the one quarter of one percent personal property tax as part of the total cost or contract price to the United States; is that right? A. Yes.

Q. Now the present total is equal to 1¼ percent; is that right? A. Yes.

Q. Including the gross receipts tax and personal property taxes, whereas before the enactment of the one percent gross receipts tax it was only one quarter of one percent? A. Correct.

Q. Now the special Montana tax clause found in sub paragraph e of the special Montana tax clause in Federal contracts requires the contractor to turn over the personal property tax refund to the United States, which is equal in this hypothetical to one quarter of one percent; is that true? A. Yes.

Q. So in essence the difference that the United States paid prior, which was one quarter of one percent, and now, one percent, is equal to ¾ of one percent; is that correct?

(Tr. 34)

MR. POORE: To which we object as leading and suggestive.

MR. STRATTON: I think the figures speak for themselves.

THE COURT: I think it does but I don't think I come out with the same answer you do. Say that again.

MR. STRATTON: Well, Your Honor, prior to the enactment of the one percent gross receipts tax this witness testified that they charged the United States for personal property taxes in their bid and that approximated one quarter of one percent. After enactment of the one percent gross receipts tax that practice was carried forward. They still charge that one quarter of one percent to the United States. In addition the one percent gross receipts tax was charged. So the total would 1¼ percent versus ¼ percent before by reason of the special Montana tax clause. The Government provides that ¼ percent or the amount representing the personal property taxes is turned back to the Federal Government leaving an effective rate of one percent to the Federal Government and the difference between the cost to the Federal Government, which was one quarter of one percent, prior to the tax and the cost now to the Federal Government of one percent is an effective cost of ¾ of one percent.

(Tr. 35)

THE COURT: I don't think that is so because you start with a quarter of a percent. You get a percent and a quarter. Presumably the ¼ of one percent is the amount of rebate that is gotten so aren't you left with one percent —

MR. STRATTON: Yes.

THE COURT: — rather than ¾ of one percent?

MR. STRATTON: You are left with one percent but the difference between the cost prior to the Act which was one quarter of one percent and the present cost, which is one percent, the cost differential is ¾ of one percent.

THE COURT: Yes, that is right.

MR. STRATTON: That is what we were trying to illustrate.

Q. Now, you testified earlier that your company has performed construction contracts awarded by private landowners as well as Governmental agencies; is that correct? A. Yes.

Q. Are you familiar generally with the general nature of public construction projects as compared with private construction projects? A. Yes.

Q. Would examples of large private construction projects
(Tr. 36)
include shopping centers, department stores, bank buildings and office buildings? A. Yes.

Q. Would examples of large public construction projects include such as the United States Post Office you built and G.S.A.-type office buildings? A. Yes.

Q. Consider for the moment a private construction project, an office building privately owned and, on the other hand, a comparable public construction project, a Federal General Services Administration office building. Is the public project intended for the use of the public? A. Yes.

Q. Is the private project intended for the use of the public? A. It is available for public use, yes.

Q. I see. And as far as the availability for public use, is there much difference between a public project and a private project of comparable nature, such as an office building? A. No.

Q. If the public project was inadequate in some particular way would this expose the public to some danger? A. If the public project were inadequate?

Q. Yes. A. Yes.

(Tr. 37)

Q. Would the same be true for a private project? A. Yes.

Q. So in that regard there isn't much difference between a public and private project. If either one were inadequate it would expose the public to danger; is that correct? A. Yes.

Q. Now consider again the same public project over the same private project, office buildings of comparable nature, generally is a public contractor to build either one of those projects experienced in his profession? A. Normally, yes.

Q. And you testified that your company has performed both public and private contracts? A. Yes.

Q. Is there much difference generally between the experience necessary for you to perform a public project versus a private project of comparable nature? A. No.

Q. Now consider again the same public project and a comparable private project. Generally must the public contractor or the contractor performing the public project establish his qualifications to the Governmental

agency awarding the public contract? A. You say generally do we have to?

Q. Do you have to establish your qualifications to the
(Tr. 38)
awarding agency? A. In some instances, yes.

Q. Generally you do? A. Yes.

Q. All right. When you perform a project for a private corporation do you generally have to establish your qualifications as well to the private landowner? A. I don't think they go through the same identical procedure as qualifying a contractor would under a public project.

Q. I see. But you would have to meet certain —

THE COURT: I have a feeling that the bond process qualifies the contractor. But go ahead.

MR. STRATTON: In the bond process?

THE COURT: Sure. Sure, the bonding companies are not going to bond somebody to build a building that's just yesterday built a chicken coop. I suspect that is where you separate the men from the boys in the contracting business because after all it's their money that is on the line when the whole thing is said and done.

MR. STRATTON: Yes, Your Honor. That was the line of my next question.

Q. I was asking you, Mr. Moran, in the performance of a public contract does the contractor invariably provide a bond?
(Tr. 39)
A. Yes.

Q. In the performance of a private construction project do you invariably provide a bond? A. Yes.

Q. Is there any substantial difference between the practice of furnishing a bond with respect to a public project and a private project of comparable nature? A. No.

Q. Consider again the same public project, a G.S.A. office building, and a comparable private building. Does the public project, the G.S.A. office building, normally involve elaborate professional planning and call for mandatory supervision or inspection? A. No more than a private project would.

Q. Now when your company is awarded a public contract do you attempt to make the project when completed as safe as possible for people using the project? A. I don't know as we make it as safe as we possibly can. We are building a project to a set of plans and specifications that inherently make the project safe. We don't make it safe by our own construction methods necessarily. We are following a set procedure that does inherently make the building safe.

Q. But you take pride in your construction work, do you not? A. Yes.

(Tr. 40)

Q. In this post office building that you constructed in Billings, Montana did you see to it it was constructed in accordance with the plans and specifications — A. Yes.

Q. — for safety? A. Yes.

Cross-Examination by Mr. Poore of Mr. Moran

(Tr. 55)

Q. Now is it your testimony to the court that although Paragraph 73 is entitled "Public Contractor's

License Fees", that it had no influence on you whatsoever in including in your information to the bidder the impact, if any, of the Montana gross receipts tax?
(Tr. 56)
A. No.

(Tr. 59)

Q. And is it your testimony that you feel that the cost to the Government, the Federal Government, on any particular job is increased by the one percent that is included in your bid? A. Yes.

Q. Now the historic impact of the gross receipts tax on Sletton Construction Company is ⅓ of a percent; is that not true? A. Yes.

Q. Why don't you include ⅓ of a percent in your bid? A. You are going back to historical cost that has averaged a third of a percent. There are projects that we have bid with various Governmental agencies where we have not received a refund. Consequently it costs us the one percent. We have no knowledge in advance of what refund we might receive on a particular project.

Q. When — A. Consequently we add the one percent in.

Q. If a change order is issued, doesn't the Government allow you to put in a full one percent tax? A. Yes.

Q. Isn't it a fact that they would require you to use your historic experience, namely ⅓ of one percent?
(Tr. 60)
A. No.

Q. Now if the job works out to be ⅓ of one percent, which is what your experience has been, then what be-

comes of the other two thirds of one percent? Doesn't that augment your profit? A. Yes.

(Tr. 65)

Q. I think I'm still confused, Mr. Moran, as to your testimony. Is it your testimony that in your opinion that although the historic impact of the gross receipts tax on Sletton is approximately ⅓ of one percent and although credits are required under your contracts with the Federal Government of personal property tax refunds to be repaid to the Federal Government, is it your testimony that in your opinion the cost to the Federal Government on a particular project is increased by the full one percent gross receipts tax? A. At the time of bidding, yes, at the time of the award of the contract. At the conclusion of the contract, if any refunds are made to the Federal Government our contract was reduced accordingly.

Q. And getting back, the true cost to the Federal Government — to any property owner — is the contract. Then by reducing the amount of the contract the cost to the
(Tr. 66)
project would be dollar for dollar reduced; is that correct? A. That is correct.

Q. So it would not be one percent. It would be one percent less whatever it was reduced. A. Whatever refunds were received, yes.

Further Examination by Mr. Stratton of Mr. Moran

(Tr. 76)

BY MR. STRATTON: Q. Now, in cross-examination I believe you testified that nothing in the terms of the contract require you to pay the one percent gross re-

ceipts tax of a Federal contract; is that true? I was a little bit confused by that. A. No. There is nothing in the contract that requires that I include the one percent tax as part of my cost.

(Tr. 77)

Q. And is it your experience that although contracts themselves over $2,000. are not negotiated but are bid on, isn't it true that large change orders are negotiated rather than bidded?
(Tr. 78)
A. Yes.

Further Examination by Mr. Poore of Mr. Moran

(Tr. 80)

Q. Is it your testimony that you are constantly changing the one percent gross receipts tax up until the last ten minutes of your bid? A. No, because by that time we have determined the range that the bid is going to fall into and whether the gross receipts tax is an exact one percent is really immaterial. It might be 99 percent of one percent or it might be 101 percent of one percent.

Q. So this hypothetical isn't the way you operate in fact. A. In theory you get the same result.

(Tr. 83)

Herbert B. Hallock

Called as a witness, duly sworn, testified as follows:

Examination by Mr. Stratton:

Q. Would you state your name, please, for the record? A. My name is Herbert B. Hallock.

Q. And your address, sir? A. 4733 N.E. Skidmore Street, Portland, Oregon.

Q. And what is your occupation or business? A. I am an accountant.

Q. And who do you work for? A. I work for R. A. Heintz Construction Company.

(Tr. 88)

In your experience how do you calculate the one percent gross receipts tax? A. Well, we don't view it exactly as a direct cost but something that must be added onto our final bid figures so that our net intake from the work will be the amount we believe we should have. In other words, this is about the last figure that would be added on to the bid. We arrive at our total bid price and then add one 99th of
(Tr. 89)
that, to be exact, to come up with the final price.

Q. Okay. Behind you I believe is Plaintiff's Exhibit 2 listing direct costs of $75,000, indirect costs of $20,000, profit of $5,000 and then one percent tax cranked in at the bottom for a total of $101,000. Is that essentially how in your experience a bid or estimate would be prepared for R. A. Heintz? A. Well, a very simplified version of it, yes.

Q. So if R. A. Heintz Company were awarded a construction contract with the Federal Government for construction in Montana, would your company then remit the one percent gross receipts tax to the State? A. Yes, we must do that.

(Tr. 95)

BY MR. STRATTON: Q. Did the fact that you refunded personal property taxes to the Federal Govern-

ment under this particular contract, did that knowledge have any effect on your bidding? A. No.

Q. Did that knowledge have any effect on your inclusion of the one percent Montana gross receipts tax? A. No.

Cross-Examination by Mr. Cosgrove of Mr. Hallock

(Tr. 107)

Q. Mr. Hallock, is the reason that you include the one percent tax in your contract because of the provisions in the pertinent Corps of Engineers contract, knowing that you're going to have to repay any refunds to the Corps? A. Well, that would not be the case in every case because the first contracts we performed under this license law had no tax provisions in them at all and yet we still had the one percent in our bid. So I'd have to say no.

Q. Well, let me go back to that again. Your answer is that the contract provision itself doesn't have any effect on why you include this one percent as a direct cost? A. Not at all. We have a copy of the law when it was enacted and the tax would be a part of our direct costs in exactly the same way that the existence of the sales tax gives rise to an addition to material costs in the State

(Tr. 108)

of Washington.

Q. Do you remember, Mr. Hallock, the deposition that was taken of you upon oral examination on November 20th in Seattle? A. Yes. I have a copy of it here.

Q. On Page 18 a question was put to you by Mr. Poore, Line 13.

"Q. Does it then follow that the Heintz Company

in the protection of its own interests will put into any contract, whether it is an initial contract or an extra, the figure (transcription error) 1% Tax so that it will be able to protect itself when it pays over any credit to the Federal Government? . . . .

"A. Well, of course we would include the 1% Tax as part of the direct cost of the job, knowing that any refund we receive would not be ours to keep, therefore the cost to us is the 1% Tax.

"Q. (By Mr. Poore) Is that your answer? A. Yes."

Now I just want to make sure I understand both positions. You are not saying something different than that here today, are you? A. No, I don't believe I am, no.

(Tr. 114)

Q. I guess my main question is if you know you are going to receive the refund and credits why do you — and you don't have to pay them to the Corps — why do you include the tax of the full one percent being aware of the washout effect of part of the tax? A. Well, if we are looking at a three year contract and we're tied to a labor rate to extend into the contract for perhaps five or six months, we have to guess at the rates the unions are going to extract from the A.G.C. over the following two years, whether it could be five percent or eight percent or nine percent or 11 percent, and our labor cost is 35 percent of the total cost, then the amount of refund that we might obtain on personal property taxes is so insubstantial it just doesn't enter into our calculations. It's a benefit that we will offset against any item that might act against us in the future

(Tr. 115)

on that contract.

Q. In effect it goes into your profit? A. That's correct.

(Tr. 149)

John E. Templeton

Called as a witness, duly sworn, testified as follows:

Examination by Mr. Stratton:

Q. Would you state your name for the record and your address? A. John E. Templeton, 8355 S.W. Seminole Trail, Tualitin, Oregon, 97062.

Q. Would you state your occupation? A. I am an auditor for the Corps of Engineers, United States Army, North Pacific Division.

Q. Could you briefly state your education beyond high school? A. I graduated with a Bachelor of Arts Degree in Professional Accounting from the University of Washington in 1963. I also took a Certified Public Accountant preparation course at the Oswald School of Accounting in Seattle.

Q. What is the title of your present position? A. My present position is Supervisory Auditor for the North Pacific Division, Corps of Engineers.

Q. And what in general are the duties of your position? A. Within the Corps of Engineers my audit staff has a dual function. We are under Army regulations set forth in the Internal Review Office to perform various' type internal audits of various operational elements within the Corps of Engineers, such as our operational dam elements, our engineering division, our comptroller areas — this

(Tr. 150)

type of thing — to provide management with an independent objective of whether these officers are meeting their functions and performing their duties as prescribed. Also we have a second function which has been

assigned to us by the Department of Defense to perform contract audits on cost-type contracts or negotiated procurements that exceed $100,000. on civil funded contracts of the Corps of Engineers. We also do the coordination for the same type of audits that are done on military contracts by the Defense Contract Audit Agency which is a separate agency other than the Corps of Engineers.

Q. So then you are the Chief Auditor of the Northern Pacific Division; is that right? A. Right. Within my staff I presently have 21 auditors working for me located in Anchorage, Seattle, Walla Walla and Portland performing these dual functions.

Q. What is your work experience prior to your present position? A. During the summer of 1962 while I was still in college at the University of Washington I did work one summer for the Central Budget Agency of the State of Washington as an auditor, more or less a trainee-type position with the State of Washington. From June 1963 to May of 1967 I was an officer in the United States Army. From May of '67 I was hired by the Seattle District Corps of

(Tr. 151)

Engineers as a staff auditor where I assisted in the performance of internal reviews and contract audits primarily up in the Libby Dam Project in Montana and I also served on the Contract Board of Awards reviewing procurement awards over $10,000. In March of 1971 I was promoted to the Chief of the Audit Branch of the Jacksonville District, Jacksonville, Florida. There I was in charge of performing within that district. I was responsible for the performance of it and assisted in the performance of the internal audits and contract audits, which one of our major functions at that time was to perform the termination audits for the termination of

the Cross Florida Barge Canal, which was a major project of the Corps that was terminated.

THE COURT: Did they ever finish that thing?

THE WITNESS: Sir, the last I heard, a Federal Judge reviewed it and they went back to reanalyze the environmental impact statements and they are currently doing that and then based on that they will decide whether they go on or not. And I also performed duties on the Contract Board of Awards on procurements over $10,000. In May of 1972 I was promoted to a supervisory auditor position with the Office of the Chief Engineer in Washington, D.C. and performed these functions in the Audit Procurement Division within the Chief's office in

(Tr. 152)

Washington. There we were responsible for supervising — there was three, my boss and two of us were responsible for supervising the 130 Corps auditors spread over the world-wide operation. These duties consisted of staff reviews and audits of various Corps division offices and districts. I acted as a consultant on equipment costs, contractor equipment costs, for the ASPR Subcommittee for Construction (phonetics). I was Army member on the D.O.D. Cost Accounting Standards Board Reviews. I coordinated the General Accounting Office audits and the United States Army Auditing Agency internal-type audits for all Corps activities. I was responsible during that time when Hurricane Agnes occurred to coordinate the Corps audit efforts in response to a request of the Office of Emergency Preparedness for emergency work where we audited contractors plus State Governments. I taught contract auditing to Corps of Engineers accounting officers at Fort Belvoir. I performed actually contract audits in the Washington D.C. area and also in-

ternal reviews within the Washington D.C. headquarters. And my current position I assumed in December of '73.

Q. Ok. Have you ever published any articles? A. Yes. In, I think, it's October of '74 I published an article on the Truth of Negotiations Act which is the act,

(Tr. 153)

the public law, under which we perform contract audits, discussing the contents and the audit procedures as I know it through my experience in the Society of American Military Engineers magazine called *Military Engineer*.

Q. Are you familiar with the provisions and operation of the One Percent Montana Gross Receipts Tax Act? A. Yes, I am.

Q. Are you familiar with the operation of the Act, the refund for personal property taxes and the credits for corporate license taxes? A. Yes, I am.

(Tr. 192)

BY MR. STRATTON: Q. Now the United States Government has certain general provisions in its contracts which are commonly referred to as boiler plate. Without interpreting the meaning of any of these general provisions, could you tell the court what specific provisions you in the course of your duties deal with? Would you please refer to Plaintiff's Exhibit 3, which is the R. A. Heintz contract? A. As I stated yesterday, one of our functions in the Corps audit is contract auditing and during this plus also during our internal reviews in the procurement areas we get involved with certain general provisions and the major ones we get involved with concern change orders or G.P., General Provision #3, the change clause, or General Provision #4, differing site conditions. And

(Tr. 193)
basically all change orders or modifications, however you want to call it, to our Corps of Engineer contracts fall generally under these two general provisions. We also get involved with General Provision #35 which is the Federal, State and local tax clause.

Q. Where are these general provisions found in this particular contract? A. You have a general index and then right behind the general index the general provisions are listed.

Q. All right. You were discussing General Provisions 3 and 4? A. Right. Basically I said these two provisions are the ones under which the change orders that we audit are generally processed.

Q. I notice that at the conclusion of General Provision 3 and also 4 there is in parenthesis the letters ASPR and a number 7-602.3 close parenthesis. Would you just clarify what the ASPR means in the Corps? A. Within the Department of Defense we have the Armed Service Procurement Regulation and this regulation sets forth our procurement procedures within D.O.D. It is paralleled by the rest of the Government agencies by the Federal Procurement Regulation, which is quite similar. The reference you see there is to Armed Service Procurement Regulation Section 7, which is the contract clause section which sets forth which clauses are required for
(Tr. 194)
various types of contracts within D.O.D. And that would be Subsection 602.1 or something like that. So the reference takes you back to the Armed Service Procurement Regulation Section 7.

Q. For clarification purposes, those Armed Service Procurement Regulations are found in Title 32 of the Code of Federal Regulations, Parts 1 through 9; is that

correct? A. Offhand I deal with the regulations, not with the U.S. Code.

Q. Could you tell me what other general provisions you deal with? A. I was just briefly mentioning the Federal, State and local tax provision, #35. We get involved with this at times due to the fact that with any increase in taxes or new taxes the contractor notifies the contracting officer by generally requesting a price adjustment due to these increases of taxes. We get involved in verifying that yes, there is an increase in taxes.

Q. How long has that clause been in the General Provisions, do you know? A. I did some research before coming here through the Audit and Procurement Division back in Washington. It's been in Federal contracts since 1941. There's been a tax clause similar to it.
(Tr. 195)

Q. I notice looking at General Provision 35 that the beginning, the heading there is (1961 August). A. This would be the date that the current clause that that contract had was put in effect in the Armed Service Procurement Regulation.

Q. August 1961? A. Yes. Another clause which to us is important in the change orders since we are there to audit the contract or proposal is General Provision 44 "Modification proposals — price breakdown" and this general provision is the one under which the contractor submits his detailed proposal to us.

Q. On price modifications to a contract? A. Right. Any size under this clause.

Q. Any size modification? A. Right. Now from the audit side, which I will discuss just briefly later, we get involved with just the larger ones. Another general

provision under which we are auditing is General Provision 56 "Price reduction for defective cost or pricing data . . ." and this clause was put in the contract as the result of Public Law 87653, commonly called The Truth In Negotiations Act. This requires a contractor to submit detailed cost or pricing data and then to certify to the Government that this data is current, accurate and complete as of the date

(Tr. 196)

of the final price agreement. General Provision 58 "Audit by Department of Defense" is a clause that relates to General Provision 56 in the fact that this clause gives the auditors the right and access to all records of the contractor in connection with this procurement.

Q. In connection with the Federal construction contract? A. Right.

Q. Is that what you mean by procurement? A. Well, from the auditor's standpoint also we do get involved in looking at other records because certain costs he proposes to use may also deal with his private sector and we look to see that these costs are being properly allocated among both sectors by determining an overhead rate.

Q. To make sure there is no distortion? A. In the proposal, this type of thing. So under that clause the auditors only interpret this as saying all records that we feel are pertinent to pricing the procurement.

Q. So that gives you authority to inspect any of the contractor's records? A. We feel this way.

Q. I see. Are there any other general provisions that you deal with? A. G.P. 66, which is that special Montana public contractor's license fees. We get involved there in checking to see

(Tr. 197)

that the refunds, and in some instances if the clause is a different one, the credits are given back to the Department of Army.

Q. I see. I notice in Plaintiff's Exhibit 3 that this clause is not the current clause; is that correct? A. In this contract, right. But this clause was modified back, I believe, it was in December of 1971.

Q. So that would be indicated on the first two pages? A. I don't have a copy here but there's a teletype that went out to R. A. Heintz to notify him of the change in the clause that he was supposed to take his refunds and credits.

MR. POORE: What clause was that again?

(Tr. 200)

MR. STRATTON: It shows that the United States Government included the one percent gross receipts tax in its Government estimate as did the contractor in his original bid. It also shows that the computations done independently by the United States Government came very close to the computations of the bidder. It is also to show there is really not any guess work when it comes to bidding; that bidding is a very precise task that is performed by a contractor and this document states that fact. If you will notice on —

THE COURT: Why wasn't it included in your pretrial exchanges?

MR. STRATTON: Well, Your Honor, #13 of the pretrial exhibits says "Construction contracts and modifications"

(Tr. 201)

and this in essence is an adjunct of a Government contract. As I say it is done merely for the purpose to

illustrate that the one percent tax is cranked in and shouldn't come of any surprise to the defendants.

THE COURT: Well, if that is the purpose just ask him if when the Government estimates these costs they crank in the tax. I guess that proves all you are about to prove, doesn't it?

MR. STRATTON: Yes, Your Honor.

THE COURT: All right, do it that way then. So the objection is sustained.

(Plaintiff's Exhibit #9 Offered and Refused by the Court)

BY MR. STRATTON: Q. Mr. Templeton, you have before you the United States Government estimate which relates back to Plaintiff's Exhibit 3 which is the—

THE COURT: Well, let's put it this way. Mr. Templeton, when the Government estimates the cost of Government projects in Montana, do the Government estimators calculate the Montana gross receipts tax?

THE WITNESS: Your Honor, yes, they do.

THE COURT: At what figure do they calculate it?

THE WITNESS: They use, like the contractors do, a one percent rate. And in one instance that I reviewed,
(Tr. 202)
which is the Exhibit #3, where we've had submitted the bid on Exhibit #3, the Government's figure is roughly within several hundred dollars of the contractor's figure.

(Tr. 208)

BY MR STRATTON: Q. Now the one percent Montana tax appears on the surface to be a simple tax. However to fully understand the actual cost effect on the contractors, the United States and the State, it may

be a complex problem. I requested you, based on your knowledge of tax administration, Government accounting, Government auditing and the United States Government procurement procedures, to develop a hypothetical and three flow charts to explain the effect of this one percent tax. Do you have those documents before you? A. Yes, I do.

(Tr. 209)

MR. POORE: What are the numbers on these exhibits?

MR. STRATTON: This is Proposed Exhibit 11. This one is 12, 13 and 14.

BY MR. STRATTON: Q. All right, Mr. Templeton, you have before you Plaintiff's Proposed Exhibit 11.

MR. POORE: If it please the court, for purposes of objection, we object to the Proposed Exhibits 11, 12, 13, and 14 and recite to the court that the deposition of Mr. Templeton was taken according to agreement and stipulation by our journeying to Seattle November 20th, 1975. So at that time there was a discovery deposition. Also there was in addition to Mr. Stratton (sic), the co-author of the audit report. We concluded that deposition with "Mr. Poore: Is there any other area that we have not covered with this witness?" "Mr. Stratton: No." The deposition then adjourned to Great Falls, Montana and I think it was December 3rd and I believe that Mr. Templeton was present in Great Falls. Am I right or wrong on that? I may be in error.

MR. COSGROVE: He was there.

MR. STRATTON: He was there.

MR. POORE: Both of the gentlemen were there. Then we have had an attorney's pretrial conference in Helena,

Montana in January of 1976. Both of the Government auditors were present at that time. We have

(Tr. 210)

had a pretrial conference — or rather a supplemental one — approximately two weeks ago I think to the day before this presiding Judge, this Honorable Court, at which again I believe both of these gentlemen were present. Pursuant to the admonition of the court we immediately met with counsel for plaintiffs after the session yesterday. We were not given an idea of these exhibits and I specifically asked Mr. Stratton if this was it and he advised me generally what was to be covered today. From what followed yesterday afternoon I was advised he would be talking about change orders which, of course, was touched on in the depositions. We represent to the court that with the predicate of Mr. Stratton requesting the witness to develop a hypothetical to explain the effect of the tax, which is certainly one of the issues in this case, that the spirit of the pretrial order and the spirit of the discovery schedule has not been adhered to and we object to each and every of the proposed exhibits.

MR. STRATTON: With all due respect, to Mr. Poore, in the deposition that was taken in Seattle, Mr. Templeton discussed a hypothetical and Plaintiff's Proposed Exhibit #11 is merely an extension of that hypothesis. And all of the foundation was laid during that deposition. This certainly can come of no surprise.

(Tr. 211)

You were aware of that. And Plaintiff's Proposed Exhibits #12, 13 and 14 are merely aides that I asked Mr. Templeton to draw up to illustrate the effect of the tax. His testimony during the deposition certainly covers these points and these were finalized as of last night. It

was not possible to give you copies before. I gave them to you the first thing this morning as soon as I could.

MR. POORE: I stand on the representation I have made.

THE COURT: I suppose what this witness could do, and there wouldn't be any objection about it, he could go to the blackboard and could be asked a hypothetical question and then on the blackboard he could put all this information and here we'd be with it. This is simply, I think, a more convenient way of doing it. I am going to let it in because I think it's a handy tool and it lays the Government's position with respect to it out in black and white. And if it's wrong, it performs a convenient — it serves as a convenient target for you to shoot at. But it looks to me as though its simply arithmetic that I could work out for myself given enough time and study. So the objections are overruled. Exhibits 11, 12, 13 and 14 are admitted.

(Plaintiff's Exhibits #11, #12, #13, and #14, Received in Evidence)

(Tr. 212)

THE COURT: I may say that I don't think the Government has been as careful in the preparation of its — well, in the pretrial disclosure as it should have been. And if I felt that this were anything that were very complex or that required much study, my rulings would probably be different. So go ahead.

BY MR. STRATTON: Q. Mr. Templeton, on Plaintiff's Exhibit #11 I notice that there are three headings. One "United States", two "State Government" and three "Private owner." You list certain direct costs, indirect costs, profit a total amount and then the one percent gross receipts tax. Could you explain that in

more detail, please? A. Basically what Mr. Jensen and I did last night was take your Plaintiff's Exhibit #2 figures and try to present something which would show the actual cost effect on the owner who may be a private individual, for private work, the State Government or on the United States Government or local government agency that is not a State Government to depict what would be their cost due to the tax and to put it in a simple format. Also to show what the effect is to the contractor in the way of what he is left with because of the tax in costs and money and also to show the effect on the State treasury. So we started with
(Tr. 213)
Plaintiff's Exhibit 2 and then mainly expanded that.

Q. I noticed comparing it to Plaintiff's Exhibit 2, the first set of figures under "United States" listing the total award costs of 101,000 is the same for the State Government award costs, 101,000 but there is a new column added in addition to Plaintiff's Exhibit 2 and that is the private owner. It looks to be there's an item called "Final cost to owner" 100,000 compared to the 101,000 for the United States and State Government. Would you explain that? A. A private owner does not pay the one percent tax, only public works contracts do.

Q. I see. Now I notice a line drawn under what is comparable to Plaintiff's Exhibit 2 and you have additional information "Personal property tax refund." Under the column "United States personal property tax refund $346." "Corporate income tax credit $194." and under "Unrefunded tax balance $460." For a total of one percent tax of $1,000. I notice that those figures are carried under the State Government column as well but not under the private owner. Would you explain that, please? A. All right. The break out or the distribution or allocations we made were based upon our

random sample audit report so that the ratio of personal property tax is the same ratio we had for out-of-state contractors on
(Tr. 214)
our random sample. So the total amount of both property tax refund and corporate credit come to what the random sample showed. That is how our allocations occurred. The unrefunded portions relate to the amount that our random sample showed would be left in the State treasury.

Q. Excuse me. Is that the figure that is also found in the pretrial order in stipulation ".46 percent for out-of-state contractors"? A. Yes, it is.

THE COURT: That's why I don't understand what we are doing. You stipulated as to the percentages of this tax that are actually a cost and I don't know why we need to gild it so much because when we get through with this we know exactly what we know when we read Paragraph 19 of the pretrial order. Do you know anything different?

MR. STRATTON: Yes, there is, Your Honor, and that is in the bottom portion of this exhibit. And I think I'll ask Mr. Templeton to explain that as briefly as possible for the court and show the difference.

THE WITNESS: Basically what we come up with is — and our flow charts show the same thing under the heading of United States or nonstate Government agency, private owner or State agency or State Treasurer — that the final cost to the United States Government is $100,654.
(Tr. 215)
for a comparable project. The final cost to a State Government is $100,346. while the final cost to the private owner would be 100,000. So due to the tax it

costs the United States Government or a local government agency more money than anybody else for the same project.

BY MR. STRATTON: Q. All right. Now turning to Plaintiff's Exhibit 12, could you briefly explain that? A. Plaintiff's Exhibit 12 describes what I have just said but it shows one thing added and that is that doing private work the contractor after paying his corporate income tax would have left $99,806.

Q. Rather than the 100,000? A. Yes.

Q. And the State treasury would be increased by $194? A. Yes.

Q. That's the total outstanding on the private project? A. Yes.

Q. I notice there is not provision for personal property taxes. Is that because the personal property tax is paid to the county? A. Right. It's paid to county government.

Q. So that would not go into the State treasury? A. Right. In this hypothetical the personal property tax, of course, is built into the $100,000. award price.

Q. Turning to Plaintiff's Exhibit 13, would you briefly
(Tr. 216)
describe that document? A. This flow chart — the important thing about this shows that, like I said before, it would cost the State for the same project $100,346. or $540. more than the private owner but the contractor also would be $540. richer for doing this public contract than doing the same one in the private sector because of the refund he gets for personal property taxes and the credit he gets for corporate income tax.

Q. He is $546. richer? A. By doing the same project for the State Government, yes.

Q. I see. Is there anything more on that chart that is pertinent? A. No.

Q. Now turning to Plaintiff's Exhibit 14, could you briefly explain that? A. This one shows what it would cost the United States Government, mainly the Department of Army, since the Department of Army is unique in that we have a clause where the contractor has to refund the personal property tax back to us so what it shows here to us is that the contractor would get $100,194, which is slightly less than he'd get doing the State job. And the reason why is that the refund comes back to us of the $346. So the net cost, like the other exhibit showed, #11, to the
(Tr. 217)
Federal Government would be $100,654. while the State treasury gets the corporate income tax of $194. plus the $460. unrefunded one percent tax.

Q. Is that all concerning that document? A. Yes.

Cross-Examination by Mr. Poore of Mr. Templeton

(Tr. 263)

MR. POORE: We'll be dealing with 11, 12, 13 and 14 I guess.

Q. At the top left column of Exhibit 11 is the handwritten label "U.S. or other than State Government agencies" and the "U.S." of course is United States, Mr. Templeton? A. Yes.

Q. And "Other than State Government agency", would that include school districts, and counties? What would it include? A. It would include any separate funded agency that is not funded out of the State treasury. An example would be the City of Missoula here.

Q. And it would include whatever number of State or local governmental units that do not receive their funds

or have an account in the State general fund in Helena? A. Yes.

Q. Ok. The middle column is "State Government". Do you equate that to the Government in Helena, the general fund in Helena? A. Yes.

Q. Then "Private owner" and I'm sure I understand that is any person who is not affected directly by this gross

(Tr. 264)

receipts tax, if you will, public versus private, is that right? A. Yes.

Q. Going back to the lefthand column again as you explained it on your direct examination, and we won't be laborious with this, you have in effect recapitulated a previous exhibit and adopted this hypothetical $100,000. contract for construction of some project? A. Yes, it is the same hypothetical previously used.

Q. For this hypothetical to exist you would have to — in all three categories there would have to be a building contract, would there not? You are talking about somebody letting a contract? A. Yes.

Q. It's a contract for the construction of some project in Montana. And then it is clear that you have direct costs across the board of $75,000, indirect costs across the board of $20,000 and profit across the board of $5,000. I believe you hypothetically assumed that this was a corporation — which I am willing to accept — is that right? A. Yes.

Q. All right. Also in your hypothesis, the contract is profitable because it does include both a $5,000. specifically identified profit and deals with a corporate

(Tr. 265)

license tax to the State of Montana; is that right? A. Yes.

Q. Now the first two columns, when you add them up, the award cost is 101,000 to the Federal Government and all State or local or county governments other than the State of Montana is 101,000 identical; is that right? A. Yes.

Q. Of course for the private owner it was 100,000 because he is not involved in the gross receipts tax; is that right? A. That's right.

Q. Then going down further on the lefthand column, you took the personal property tax refund from the general figures of your — from the figures arrived at from your random sample? A. Yes, the share.

Q. Right. A. The percentage was used to allocate. In other words, if you went back in the random sample and you looked at of the total reduction in the one percent payment roughly 34 percent or 34.6 percent of that was for personal property tax.

Q. Right. So this first column is the refund of personal property tax to the contractor? A. Right.

(Tr. 266)

Q. And under the Federal plus all of the various State contracts by school districts and counties, cities, the refund to the contractor is $346. It is also $346. in the middle column to the State itself where the State is the awarding agency? A. Yes.

Q. Then the next line down, since this is a corporation that has been awarded this contract and since the contract is profitable, there is a tax credit, an income tax credit we could call it I think, of $194. under the column of the Federal Government and a like amount in the column to the State? A. Yes.

Q. Then it gets kind of faint. I guess it's unreturned — A. Unrefunded.

Q. Excuse me, sir? A. Unrefunded.

Q. Unrefunded tax balance. This is where it did not wash out or zero out. And there is a balance of $460. This is the Montana gross receipts tax, is it not? A. Right, this would be —

Q. The balance of it? A. This would be the balance, the unrefunded or uncredited balance.

Q. So those are identical so far in the two columns. Then you

(Tr. 267)

totaled those and accounted for 100 percent of the $1,000. of tax that this particular contract generated; is that right? A. Yes.

Q. Ok. Then attached onto my copy and I guess it's on yours too — A. I have it here.

Q. — is another pair of columns intended to match, it looks to me like, on the first two columns. "U.S. or other State Government agency", that is the same categorization as immediately above it, is it not? A. Yes.

Q. The other column "State Government" is the same categorization. Then you take, and here I'm going to ask you to please correct me where I have misconstrued what you have done, the United States gets back the $346. personal property tax refund from the contractor and that would be by virtue of the terms of the contract with the Corps of Army Engineers? A. Right. So only the Department of Army contracts which include that clause would get the refund back.

Q. Or any other Government agency, to borrow your phrase, that was smart enough to put such a clause in their contracts? A. Right.

(Tr. 268)

Q. Then going over to the State Government, the contractor gets back the $346. of personal property tax because he had paid it and can produce vouchers to the Department of Revenue and he receives that refund and, as you put in there, and he keeps it. A. Right.

Q. In your next step, #2, as it is on my copy here, over on the lefthand side under the U.S. column, then the contractor gets $149. corporate income tax credit? A. 194.

Q. Yes sir. Did I misspeak myself? The $194. corporate income tax credit. I'm reading on "At this time the State Treasurer would transfer this amount from the one percent tax fund to the General Fund." And you put the same language over there in the middle column for the one under the State Government; is that correct? A. That's right.

Q. Is that important to your conclusions that at this time the State Treasurer would transfer the amount from the one percent tax fund to the general fund? A. It was just to keep it straight in my mind from a Governmental accounting sense. This is just a paper shuffle within the Treasury just like we do in the Federal Government in our treasury.

Q. So do you want us to leave that in there or is it something

(Tr. 269)

we can eliminate or are we supposed to retain that? A. Just leave it.

Q. All right, the third item on the lefthand column is "The unrefunded tax balance of $460. stays in the State —" and you'll have to help me there. What is that little "stays in the State — A. One percent tax fund.

Q. "One percent tax fund. Eventual transfer to the general fund." And the identical language appears under #3 for the State Government; is that right? A. Yes. The point there is that within the State Government the money never leaves the State Treasury.

Q. All right. Then you draw a line and you have some, I think I would say, conclusions or computations or you did something with figures to arrive at a final cost to the awarding agency in the lefthand column as $100,654. and the final cost to the awarding agency in the State Government is $100,346. A. That is correct.

Q. Obviously these are not equal. Now in the lefthand column where did the 100,000 — the lefthand column is the Federal and other State Government subdivisions — where did the 100,654 come from? A. That would be the $101,000. that would have been paid to the contractor less the Department of Army refund we
(Tr. 270)
received for the $346. personal property tax. So we pay out initially $101,000. from the Department of Army but we get a refund back at the end and the project costs on our ledger would wash out and come down to 100,654.

Q. Ok. Now going over to the State Government, you had a similar, or at least a similar categorization, conclusion "Final cost to the awarding agency of $100,346." Now would you tell us how you arrived at that figure? A. Well, the $1,000. tax payment, since the State withholds that payment from the contractor, we pay the contractor only $100,000. The State Treasurer, meanwhile, or the accounting agency within the State would make a book entry moving $1,000. over to the tax fund. Upon the refunds, when they come, they

would wash these out against the amount in the tax fund. The contractor gets a check for $346. personal property tax. The State Treasurer would then transfer the $194. corporate income tax to the general fund and eventually the remaining balance would more than likely get washed to the general fund. So in the end the State's true cost is $346. which is paying the contractor for his personal property tax.

Q. Now you started the top of your assumed hypothetical and you use the words down here "Awarding agency" and at the top of it you have "Award costs". Now correct me if I am wrong in the way I explain how you got the $100,346. I'll
(Tr. 271)
go step by step so any confusion won't spill over onto you. You take this award cost to the State Government of $101,000. — the middle column up there? A. Yes, I'm with you.

Q. And if you subtract from it the corporate income tax credit of $194. plus the $460. of unrefunded tax balance, you subtract the combination of the two, would you end up with $100,346? A. Yes.

Q. Am I correct in this — and you've done it here — what you have done is you take these two figures that we just talked about, the 194 and the 460, and you deduct it from what you call the award costs or the contract cost to the awarding agency, the $101,000? A. Your method comes up with the same effect at the end but as an accountant, we have a means by which whenever you analyze a transaction or find something that is difficult to analyze we use what is called T accounts. And this is a basic bookkeeping-type thing where you draw your T account and flow it. In this situation it ends up the same. I personally like the ap-

proach I use, which is the flow account method, to trace it the way it occurs in that the $100,000. gets paid to the contractor, the State Treasurer actually does issue a check. And as an auditor this is something I could follow if I ever

(Tr. 272)

wanted to follow this. Two, I would see a paper by the State Treasurer transferring $1,000. to the tax fund from the general fund. Then I would see another document, as an auditor, which came in and showed a payment from the tax fund by the Treasurer of the personal property tax $346. The next thing I would see is another paper documenting the transfer of the $194. from the tax fund for corporate income tax credit to the general fund and with that the general ledger accounts for the Treasurer for that project would then show, if he allocated the personal property tax to the particular project, 100,346. That to me as an accountant, not a lawyer but as an accountant, is a clear flow of how the costs occurred and what the end result is. And that's how we achieved our 100,346.

Q. To me as a layman and a lawyer, we get the same thing by taking the final award cost at the top of the page of $101,000. and just subtracting Items 2 and 3 in the middle column. A. But you lose — until we flow charted it, I didn't see it until last night and neither did Norm Jensen, my cohort, until we flow charted it out we really didn't realize the end result of the tax as passed appears to us to be the State is now paying the personal property tax of the contractor. And it clearly shows when you flow chart

(Tr. 273)

it out.

Q. All right. Then you endeavored to compare — then your conclusion is the final cost to the awarding agency,

you take and compare $100,654, and there again you took the $346. off of the $101,000. and you compare that with the 100,346 and you conclude that the cost to the Federal Government or to any other State of Montana awarding agency other than the State itself would be greater than to the State itself? A. Yes.

Q. Now integral to your — a necessary part of this is to take the $194. of corporate income tax credit and take it away from the $100,000. figure that we've already talked about? A. What do you want me to do now?

Q. Well, you've already testified that the $100,346. is arrived at by taking $654. from $101,000. and part of that is the $194 corporate license tax credit; is that right? A. Basically what I testified to was that the $1,000. is where the adjustment is taken, the $1,000. that has been already transferred to the State tax fund. But the adjustments for personal property tax and corporate income tax credits are taken against the $1,000. That $100,000. becomes a contract cost and is processed on a

(Tr. 274)

separate check.

Q. But it's the same thing? A. If you went to audit the State of Montana records you would not find a check to the contractor for $101,000.

Q. But to have the cost, the final cost, to the awarding agency you have to apply that $194. corporate license tax to that. You have to apply it to the original awarding cost in some manner, do you not? A. That's a division of the profit factor.

Q. But it's there. A. Well, I think I like the definition that Mr. Moran gave, which is that until the proj-

ect is done you don't know if you are going to have a profit. You hope for a profit. When you get done you then share this luck with Government agencies.

Q. The award cost to the State Government was $101,000. per your Plaintiff's Exhibit 11. The final cost to the awarding agency is $100,346. That's a difference of 654 and that amount can be arrived at by the figures that are given in the middle of Exhibit 2 in column — the middle column — of $194. corporate license tax and $460. balance of Montana gross receipts tax, can it not? A. Yes.

Q. Ok. Let's go on if we can —

THE COURT: Before you leave this I have a question.

Examination by the Court of Mr. Templeton:

(Tr. 275)

Q. In connection with the corporate license tax, are you conceiving that this $194. in corporate license tax is all generated by the profits from the contract? A. Yes sir, Your Honor, in that the $194. would be the same in this example for the private job, the State job —

Q. No. Is this profit all generated from this contract, this tax? A. In the hypothetical, yes. We assumed that.

Q. You see it wouldn't work out that way if the contractor made money in the private sector and the public sector and managed to get the corporate license tax credit for both. Then of course, the cost to the State — you couldn't deduct it all in determining the cost to the State. A. Well, Your Honor, the way it works, he files for personal property tax refund —

Q. I'm not worried about the personal property tax. A. Well, it's the same with the corporate tax. It could

relate to the private project. He gets a credit against the amount on the public job.

Q. If the State were going to tax him for that $194. anyway, you see they are entitled to that on account of other profits that he's made. So you can't say that this is a cost —
(Tr. 276)
A. To the State.

Q. To the State or — no, that this is a reimbursement to the State because it isn't if this is generated somewhere other than in the contract. A. That's why we went the other way to bring it from a contract cost — that actually the only cost that comes is the check to the contractor to the State plus the check from the personal property tax.

Q. But I think that is a vice that is inherent in it because in many cases the contractor might be getting a credit for corporate income tax that had nothing to do with the job that they would have gotten anyway, in which event the cost to the State is greater than you show it here. A. Yes, it would go up.

Further Examination by Mr. Poore of Mr. Templeton:

Q. Now as I understand your testimony, Mr. Templeton, you are in this example assuming, I think, as you said, as with the Federal Government it all goes into one big pot, that you clear it all into the general fund and that is the ultimate of what you do? A. Right. Within Governmental accounting a lot of money transfers but it's all done on paper. People really don't have their hands on it.

Q. That's comparable to your Federal Government too?

(Tr. 277)
A. Yes.

Q. Ok. Well then following that along a little bit, referring to the lefthand column of Plaintiff's Exhibit 11, the award cost to the Federal Government of this particular contract was $101,000. What you are trying to find out is the final cost to the Federal Government, which is the awarding agency. Isn't that what you are trying to do? A. Yes.

Q. And as you have already testified, this is based upon a firm contract? A. An agreement.

Q. Right. Ok. And that is profitable to the performing contractor? A. Yes.

Q. So he earns and must pay Federal income tax, Federal corporate tax? A. Possibly. Probably.

Q. Absolutely. A. We didn't consider the Federal taxes.

Q. No, that is my job now. A. Ok, go ahead.

Q. So we list these things and it all goes into one big pot you've been talking about. So there, first of all, is the Federal corporate tax and what are the rates of Federal corporate tax as opposed to the State of Montana
(Tr. 278)
tax which, I think, is 6¼ percent?

MR. COSGROVE: I think 6¾.

BY MR. POORE: Q. 6¾. In other words, this $194. was generated on a 6¾ basis. What is the Federal corporation tax rate? A. I'm not a corporate tax auditor. I don't know. You tell me.

Q. How does 52 percent grab you? A. That's what I thought it was.

Q. Versus 6¾ percent?

THE COURT: It grabs you pretty heavy if you're paying it.

(Laughter)

BY MR. POORE: Q. This is a firm contract that the Federal Government has with a contractor so he has employees so there will flow to the Government the employees' individual income taxes, whatever they are; isn't that true? A. Based on the salary of the corporate people.

Q. True. If there are subcontracts, the subcontractor, if it's profitable, would be paying corporate license tax to the Federal Government or could? A. Could.

Q. If the subcontractor has employees, they'd be paying individual income tax to the Federal Government on their
(Tr. 279)
salaries or wages if they were sufficient to generate a tax? A. (No response)

Q. So if you are going to allocate back to the State of Montana the impact of the Montana license tax, which is $194, isn't it fair to allocate back to the cost of the project for the Federal Government the sum total of whatever these would be? A. What you're trying to do —

Q. No, just answer my question. A. I did not — in our hypothetical, which you are missing Mr. Poore —

Q. Just a second. A. We did not include —

Q. No, just a second. Just a second.

THE COURT: Go ahead, let him answer.

BY MR. POORE: Q. I'm sorry. Go ahead. A. In our — in the way we developed the 100,346 we did not consider the 194 as a cost. Therefore, to do it in this instance would be inconsistent. It wouldn't be on the same basis, you see, because again we looked strictly at the cost to the awarding agency plus the personal property tax check. We didn't take — in this hypothesis we did not take or even refer to the $194. as being anything because the State gets it on all three

(Tr. 280)

projects. This is the thing, that all owners — you know if a guy is doing work on a U. S., local government, State or private contract, he pays Federal corporate taxes. He pays State corporate taxes. However only the public contracts carry the one percent tax. So here we have public contracts carrying three taxes and we have private contracts carrying only two. So there is a discrepancy.

Q. Thank you, Mr. Templeton. We offer in evidence Defendant's Proposed Exhibit B for illustrative purposes on the cross-examination of the witness.

THE COURT: Very well, Exhibit B may be admitted.

(Defendant's Exhibit B Received in Evidence)

BY MR. POORE: Q. Going then to Plaintiff's Exhibit 12, Mr. Templeton, do you have this convenient to yourself? A. I've got one but mine is not numbered. Is 12 the private owner?

Q. Yes sir. A. Ok.

Q. Why don't you write on it and we won't get mixed up. I want to trace through what I think that you have written here. The little moon or little circle at the left is labeled "Private owner" and is this the final cost to the

(Tr. 281)

private owner or would you tell me what is the $100,000? A. It represents the final price to the private owner.

Q. Ok. Again a firm contract is involved. You call that the contract award — A. Yes.

Q. — at the top there. And there are arrows that go to the contractor so he has been awarded this contract. Then the middle one he performs some work apparently and then he — that next little arrow goes back and he requests payment from the private owner; right? A. Right. He's completed the contract.

Q. He has completed the contract and he gets a payment of the full 100,000? A. Yes.

Q. But then you take off of that a certain figure, do you not, for the contract because the 100,000 doesn't end up in the circle for the contractor. A. He pays his corporate income tax. We didn't figure it but there would be Federal taxes in this.

Q. All right. So again that $194. that we have been working with, you take this off for the contractor and send it down to the State Treasurer? A. Right. Because in these flow charts is where we started looking at what does the contractor gain on this tax and we felt that was quite informative after we got done.

(Tr. 282)

Q. In fact you helped me to suggest to myself that the contractor could also put another arrow down there of Federal license tax, could he not, and should? A. Federal license tax? I'm not —

Q. Federal corporate tax, excuse me. Federal corporate income tax. A. Right, because whatever he paid

would reduce — on the particular contract allocable to it — would reduce the 99,806.

Q. So on my copy I just wrote another arrow coming down from that fund. That goes to the Federal Government, doesn't it? A. Yes.

Q. So I made myself a little balloon on the righthand side to the Federal Government. Under your exhibit you sent the $194. to the State Treasurer? A. Yes.

Q. Turning to your Exhibit 13, sir — A. Is that entitled "State Contracts"?

Q. Yes sir.

THE COURT: Yes.

THE WITNESS: Ok.

BY MR. POORE: Q. Well, going back to #12, what is your conclusion from Plaintiff's Exhibit 12, that the State ends up with $194. out of the private contract?
(Tr. 283)
A. It ends up with the taxes it would always get.

Q. In this example the $194? A. Right. Basically on that one I'd say when you compare all three together, the top two balloons, the private owner cost and the contractor cost is what these flow charts really bring to light I think.

Q. And in addition to that the conclusion is that the Federal Government gets some tax from the contractor; is that correct? A. Pardon me?

Q. The Federal Government also gets some tax from the contractor? A. Right. We didn't put that in the hypothesis but that would be true.

Q. Going over to 13, on the left side it says "State agency". That would be, as you have defined it, the

middle column of Exhibit — A. It could be the Department of Transportation or something like this.

Q. A department of the State? A. Something like that.

Q. Ok. Again it awards a contract to the contractor and this $100,346. is the same figure as the $100,346. in the middle column of Exhibit 11? A. Right. We tried to trace everything, keep everything on
(Tr. 284)
exactly the same dollar figures and amounts and keep it all tied together.

Q. Then the contractor, after he gets that $100,346, you have him disbursing it to the State Treasurer in the first arrow — well, first he gets the 100,000 and the second arrow there is property — let me see — a refund request from the contractor to the State Treasurer for the $346. which is the — A. Personal property tax.

Q. The personal property tax of Exhibit 11. And he requests $346. and he gets — the $346. comes back to him; is that right? A. Right.

Q. Now over on the left there are some arrows from the State agency down to the State Treasurer. Could you explain those? A. Ok. Basically that was — our Government accounting notes that, one, that normally before an agency can award anything it has to have availability of funds.

Q. Pardon me, sir, I didn't hear that. A. Before a control — the internal controls within a Government agency, State or Federal, is that before award you always make sure you have an availability of funds. This is —

Q. What kind of funds, sir?

(Tr. 285)
A. Funds, contract funds.

Q. An availability of funds? A. Right. So the comptroller-types notify the people awarding that "Yes, we do have enough money to cover the contract up to so much amount." The awarding agency would then award that contract. When the work gets done and payment requests are received, then they go back and request a check less the one percent tax be issued to the contractor.

Q. And it is integral to the hypothesis here that the awarding agency must have funds available before it embarks on the letting of a contract? A. Yes.

Q. What you are doing is endeavoring to account back against that fund? A. And to show that that is a paper transaction there and that those funds don't actually — aren't transported over to the awarding State agency and he holds them until he gives them to the contractor.

Q. There is no question in your mind, is there, Mr. Templeton, that as to your Exhibits 7 and 8 the reference to the dollars there being held by the State of Montana pursuant to the court order and the stipulation are actual dollars and that they exist? A. I am sure that the State Treasurer is solvent.

(Tr. 286)

Q. And that if money is deposited in U. S. Treasury Notes, that those notes or bills exist and are bearing interest? A. I'm not that familiar with it. If they are in notes, they would be bearing interest.

Q. And that they exist. They are not just a figment of any accountant's imagination? A. Your interrogatories state they exist.

Q. And you don't challenge it? A. No, I don't.

Q. Going on to 14 —

THE COURT: Well, I have a question about this one now. If I understand you right, when the State Treasurer pays the contractor, he pays him the contract price less one percent so if the contract price is $100,000. —

THE WITNESS: In this instance, $101,000.

THE COURT: I see. So they pay him roughly $100,000?

THE WITNESS: Right.

THE COURT: Ok.

BY MR. POORE: Q. Actually this was originally 100,000 and with the transfer of the refund back it became $100,346? A. Right.

Q. It took two steps to get that up to the 100,346? A. No, because the one check comes from the State Treasury of 100,000 plus later the $346. check.

(Tr. 287)

Q. Those are one, two, those are two separate things? A. But the difference between that and the private is $540. The contractor's net gain on the private would have been $540. less due to the fact that now through the corporate income tax credit effect he himself gets advantage of $540. which would be the $346. check he gets back plus the fact that now he doesn't have to remit a check for corporate income tax.

MR. POORE: I don't understand that.

THE COURT: I don't either.

BY MR. POORE: Q. This contractor in Exhibit 13 is the same contractor in 12, is it not? A. Ok. What

we're talking about here is that under a private contract of course when he pays his corporate income tax he remits a check for $194. to the State Treasurer for the corporate income tax. In this situation the State, in essence, transfers $1,000. over to the tax fund in his name for future refunds of personal property tax and corporate income tax credits. So now rather than remitting a check he sends in his corporate tax refund and takes a credit against the $1,000. in his name over there that the State has paid in and so he gets his $194. paid for by the State Government.

Q. Under 13 the State, which is the State contract, this
(Tr. 288)
contractor would also, of course, have to remit his various categories of income tax to the Federal Government would he not? A. Yes, just like you would in private.

Q. In fact we could add, could we not, any Federal fuel tax over here to the exhibit if it's all one big accounting — arising out of this contract if it was of a nature that would involve fuel and Federal tax on fuel, this would also go to the coffers of the Federal Government, would it not? A. Like a State fuel tax?

Q. Sure. A. But in this instance again the Federal fuel tax is a tax that applies not only to the public sector but the private sector, while the Montana one percent only applies to the public sector.

Q. In your 14, sir, could we trace that through? Again the categorization is the U. S. and not all of the agencies of the State of Montana but your only categorization is between the U.S. and, for example, school districts? A. As we said, separately funded-type local interests.

Q. And again you start off with the category of the U.S. or non state Government and there $100,654. is the figure that you've got here at the bottom of the first column of Plaintiff's 11?
(Tr. 289)
A. Right, because when we — when the contractor after awarding does the work, when the agency pays him, they issue him a check for $101,000. to the contractor. The contractor then receives this check and under the State law remits one percent or $1,000. to the State to hold in the tax account for him.

Q. That's the arrow coming down to the left here?
A. Yes.

Q. Ok. A. He then files his personal property tax refund of $346. and lists his corporate tax credit of $194. receiving back from the State then a check for his personal property tax of $346. Now only the Department of Army who has the clause gets back then the $346, which then it reduces the Army's cost from the original $101,000. to 100,654 because the Department of Army takes away from the contractor the personal property tax refund and the contractor's net gain over what he would have got doing the same job for the private sector is only the difference between 100,194 and the figure we had on Exhibit 12, the 99,806. So as a result of the tax really the Department of Army or the U.S. or local government ends up paying the contractor's corporate income tax for him.

Q. And again in an effort to find out the cost to the
(Tr. 290)
Federal Government, which is one of the things that appears on Plaintiff's 14, we should take a series of refunds over — not refunds — but sources of revenue to the United States representative of the various categories

on Defendant's Exhibit B, should we not? A. In each situation he'd pay the same Federal taxes.

Q. And such taxes would then end up in the general fund of the United States? A. Yes.

Q. All arising by virtue of the letting of the contract? A. Under this hypothesis, yes. In this 14, however, the State Treasury, which is noted, gets to keep the unrefunded portion of the Federal monies or the local government monies. This $460. down there become a plus to the State. So Federal contractors subsidize the State Treasury.

Q. That's the same $460. that we have been tracing through here on these exhibits? A. Yes.

MR. POORE: I believe that's all we have. Thank you, Mr. Templeton.

Examination by the Court of Mr. Templeton:

Q. I'm still not quite sure about this private owner chart of yours. The private contractor you show as getting a net out of the contract of $99,806. and I can see how

(Tr. 291)

that comes out. But when you start comparing it with your Exhibit 14 I don't quite see how it does because here you've got $100,000. contract and there you have a contract for $101,000. A. But the only difference, Your Honor, is the one percent tax.

Q. I know that. A. So if we didn't have the one percent tax we'd all be awarding $100,000. contract and when the contractor got done he'd be transmitting a check to the State for the corporate tax of $194. and so because of the tax refunds and credits approach, really the contractor gains on both.

Q. But you don't have an arrow showing the payment of that $1,000. in here, as I see it. A. Yes, on Item 14 we do, the tax payment $1,000, the very top arrow from the contractor to the State Treasurer. The State law, sir, says that the awarding agency is supposed to withhold. None of the Federal Government agencies do. So the law further provides, as I read it, that the contractor is obligated if we don't withhold the $1,000. and transmit it to the State, the contractor makes the payment instead of the Federal Government and a lot of times instead of a local agency that doesn't understand the tax. So that's why the $1,000. The

(Tr. 292)

$1,000. goes to the contractor and the $1,000. then goes from the contractor to the State Treasurer. Now if the United States Government was following the regulations of the State Revenue Department and we remitted the one percent to the State, our ledger for that project would still show $101,000. because when we issued a check to the State we would charge it to that project.

Q. Well, that may answer it.

PHILIP MARONICK

(Tr. 296)

Called as a witness, duly sworn, testified as follows:

(Tr. 297)

Examination by Mr. Cosgrove:

Q. Would you state your name for the court? A. Phil Maronick.

Q. Where do you reside? A. East Helena, Montana.

Q. And what is your present occupation? A. I am a contractor.

Q. And for whom do you work? A. Maronick Construction Company.

Q. And what is your position with Maronick Construction Company? A. I am the president of Maronick Construction Company.

Q. Could you briefly give the court a little background with respect to your educational background after high school? A. Yes. I have a degree in economics from the University of Notre Dame and a degree in civil engineering from Montana State University.

Q. How long have you been working in the construction industry? A. Approximately all my life.

Q. How long has Maronick Construction Company been operating? A. Maronick Construction — about 18 years.

Q. Have you been with it all that time? A. Yes, I have.

(Tr. 298)

Q. Now your present title is president and general manager, did you say? A. Yes.

Q. And what really do your duties entail? A. We are a small company so my duties entail just about everything that goes on in the company. I oversee our office work as well as all our supervisors. I do all of the bidding and some of the dirty work too.

Q. Do you have people that work for you that give you information when you are estimating and making your final bid, they supply the information you need in compiling the bid — A. Yes.

Q. — any people in your office? A. Yes. We don't have an estimator per se.

Q. Do you have field supervisors that provide this sort of information to you? A. Yes.

Q. Are you the sole owner of Maronick Construction Company? A. No, my father is also an owner.

Q. Do you have a substantial investment in it? A. I own approximately 80 percent.

Q. 80 percent? A. It's in that range.

Q. Now what type of work, construction work, does Maronick

(Tr. 299)

Construction Company do primarily? A. Generally speaking heavy highway.

Q. And has that been true throughout the entire history of your company? A. Yes, it has.

Q. Now you mentioned briefly a few minutes ago that you do get involved in the bidding procedures of Maronick Construction? A. Yes, I do.

Q. Who makes the final bid? A. I do.

(Tr. 301)

Q. I believe the statement was made earlier today that bidding is a pretty precise science. Would you agree with that statement? A. Oh, I would have to disagree with that entirely.

Q. What would your statement be with respect to the science or the art of bidding?

(Tr. 302)

A. Well, I think the actual cost system can be precise but the actual determination of what the job is actually worth, there are so many contingencies in every job and so many things that you cannot actually determine and you are taking a risk in a great many jobs and this is your calculation, how much do you put on that risk.

Q. What you have called the risk factor? A. That's what I call it, yes.

Q. You've been around bid openings, I take it? A. You bet.

Q. And you have probably seen variances between the high and low bids on any job? A. Yes, I have.

Q. What can that vary or what has that varied in your experience? A. Well, it will go between — between the high and the low it varies as much as 50 percent.

Q. 50 percent? A. That's right.

Q. It's hard for me to understand. I would think that you know the direct costs, for example, on equipment. I mean an earth mover costs everyone about the same or gasoline costs everyone about the same. How can one contractor be 50 percent higher than another? A. Well, I think a lot depends on how badly you want the job

(Tr. 303)

and your circumstances at the moment. Do you have equipment enough to handle the job. Is your equipment sitting there. Does it fit in this particular job. These are all variables among different contractors.

Q. So it goes back to the inexact science of bidding? A. That's the way I see it.

Q. Now, you are, of course, familiar with the taxes that your company pays in Montana? A. Yes.

Q. When you are preparing your bid or working on your estimate and you are going to bid a job for a public agency, what taxes do you consider? A. All applicable taxes. Property taxes, fuel taxes.

Q. Ok. Let's take them one at a time. What would you estimate your property taxes on, your personal property? A. Yes.

Q. On your equipment? Where would you figure that in? A. Direct cost.

Q. You estimate or figure what the rate will be? A. Yes.

Q. In your experience has it been difficult to estimate what that rate will be? A. Yes.

Q. Now you mentioned gasoline tax. Do you figure in something for what gasoline tax you might have to pay? (Tr. 304)

A. Yes.

Q. Where would that be? A. In the direct costs.

Q. Under which item? A. This would naturally apply to the rental rate of a piece of equipment, let's put it that way.

Q. Would that be as on the property tax, the rental rate on that piece of equipment? A. That would go directly to that individual piece of equipment.

Q. And that cost would then — or those taxes would then increase the cost to the project? A. Yes.

Q. You are familiar with the Montana gross receipts tax? A. Yes.

Q. And with the offsets and credits? A. Yes.

Q. When you are figuring your estimates what do you include for the gross receipts tax? A. I do not take into account the contractor's gross receipts tax.

Q. You include nothing for it? A. That's correct. In our experience with our company we find that it

comes very close to washing itself out and, consequently, it's an inconsequential cost.

(Tr. 305)

Q. And so you simply add nothing in? A. That's correct.

(Tr. 307)

Q. Now if you were bidding a project for the State of Montana or any public agency or the Federal Government, take, for example, that you have a construction project that is going to cost $100,000. If that is being awarded by the Federal Government or the county of Missoula would that affect how much or would that affect what your bid will be, who is awarding that contract? A. No, it wouldn't.

Q. It isn't any more or any less to you because it is let by the State of Montana — A. No.

Q. — or the Federal Government? A. No.

(Tr. 308)

Q. This tax went into effect in 1967. Have you had any 100 percent Federally funded jobs since the inception of this tax? A. Yes, we have.

Q. And where was that? A. The highway project on McDonald Pass.

Q. That's outside of Helena? A. Yes.

Q. That was 100 percent Federally funded? A. Yes.

Q. Who was the contract awarding agency? A. The Federal Highway Administration.

Q. Now what year was that job? A. 1973.

Q. On that particular job did you work on preparing the final bid that was submitted? A. Yes, I did.

Q. And did you include anything in that job for the contractor's gross receipts tax? A. No, I did not.

Q. Do you know of your own knowledge if that contract you had with the Federal Highway Administration required you to pay over any refunds or credits which you might receive under the tax to the awarding agency? A. No sir, it did not.

(Tr. 309)

Q. It did what? A. It did not require us to pay any refund.

Q. Did that contract have a provision in there stating to the effect that you must include or you must be able to pay all your own taxes that are applicable to you in Montana? A. Yes.

Q. And you included nothing for the contractor's gross receipts tax? A. That's correct.

Q. Now, Mr. Maronick, we have been — you might have heard during the testimony today that the Federal Corps of Engineers includes in their contracts a provision which requires the contractor to pay over in some instances merely the personal property tax and in other instances both the personal property tax and the corporate license tax to the Corps of Engineers. Now if you on your Federal Highway Administration project had faced or had such a provision in your contract, would that have made any difference in your figuring your contractor's gross receipts tax? A. Yes, I think it would. I think I would include that as a cost factor.

Q. You would include what? A. That refund.

ROBERT McINTYRE

(Tr. 324)

Called as a witness, duly sworn, testified as follows:

Examination by Mr. Cosgrove:

Q. Would you state your name for the court, please? A. My name is Robert B. McIntyre.

Q. Where do you reside? A. In Great Falls, Montana.

Q. By whom are you presently employed? A. McIntyre Construction Company.

Q. Where is that located? A. In Great Falls, Montana.

Q. And what is your position in the McIntyre Construction Company? A. I am president of McIntyre Construction Company.

Q. Would you give the court the background of your education after high school? A. I attended Montana State University and graduated in the winter of 1966 with a degree in geology.

Q. Have you had postgraduate work? A. I have not.

Q. How about some of your work experience?
(Tr. 325)
A. I have since — in 1961 I worked as a temporary summer employee on highway construction and in 1967 I went to work for S. Birch, Inc., a highway contractor out of Great Falls.

Q. What was your position with them? A. I was an estimator.

Q. And as such what sort of estimating were you doing? A. I was estimating all construction work that they were doing at that time.

Q. What kind of contractor is S. Birch? A. A heavy highway contractor primarily in the construction of highways.

Q. Now that was up to 1971? A. 1970. In 1970 we formed McIntyre Construction Company and I became an employee of McIntyre Construction Company in that year.

Q. And what were your duties with McIntyre Construction? A. I am general manager and in charge of all their construction work.

(Tr. 333)

Q. Now you have mentioned that you have a factor for taxes and bond; is that correct? A. Yes.

Q. Now which taxes were you talking about in this? A. I'm talking about the Montana gross contractor's tax.

Q. And not the property or the gasoline tax, for example?
(Tr. 334)
A. No. Those taxes are in our equipment rental rates. They're included in the equipment rental rates.

Q. As a direct cost? A. Yes.

(Tr. 337)

BY MR. COSGROVE: Q. Why don't you include the one percent tax, you know, straight across the board at one percent? A. Because of our credits allowed on personal property tax, which that portion of our costs is included elsewhere in the bid.

Q. And historically it's been ¾ of one percent? A. Our rates have historically been a little less than that. This is the figure we are using in our estimating.

Q. If you were looking at a job that, say for example, was worth $100,000. and going to be let by the State of Montana or the Federal Government, because it is let by

either the Federal Government or the State of Montana, would that affect the price of your bid? A. No, it would not.

Q. You don't bid any less knowing it's going to the State of Montana? A. No.

Q. The contractor's gross receipts tax went into effect in 1967. Since that time has your company been involved in any 100 percent Federally funded projects? A. Yes, we have.

Q. Where was that? A. It was a Safeguard Missile access road by Conrad, Montana done for the Federal Highway Administration.

(Tr. 338)

Q. For the Federal Highway Administration? A. Yes.

Q. On that job did you work on preparing the bid for that job? A. Yes.

Q. Did you make the final bid on the job? A. Yes.

Q. On that job what did you include for the contractor's gross receipts tax? A. I don't recall the effective rate we were using right at that time.

Q. Well, did you include one percent across the board? A. No. We tried to equal one percent with our personal property tax and our allowance for gross contractor's tax combined.

Q. So you attempted to figure the net tax? A. Yes, we did.

Q. Now do you know if that contract had any provision in it requiring that any refund you receive from personal property tax credits or personal property taxes

be turned over to the awarding agency? A. It did not have any such clause.

Q. It had none? A. No.

Q. Now assume for the moment, Mr. McIntyre, that the contract had such a clause. Would that have made any difference to
(Tr. 339)
you in computing the one percent gross receipts tax? A. Yes, it would have.

Q. How? A. The way we would handle it would be to include instead of the effective tax rate of ¾ of one percent that we've been using, we would use the straight one percent and keep our personal property taxes just as they are.

Q. And it would only be because of that provision that that would change the way you operate right now? A. If we had to give back a portion of the money that we had been using as a credit, that portion would become a cost to us and we would cover it in the way that I mentioned.

PHILIP HAUCK

(Tr. 381)

Called as a witness, duly sworn, testified as follows:

Examination by Mr. Poore:

Q. Would you please state your name to the court? A. Phil Hauck.

Q. Where do you reside, Mr. Hauck? A. In Helena, Montana.

Q. What is your business or profession? A. I work for the State of Montana. I am an architect.

Q. And are you a duly licensed architect in the State of Montana? A. Yes, I am.

Q. At the present time you are in the employ of the State of
(Tr. 382)
Montana? A. Yes.

Q. And what is your position or title? A. I head the Office of the State Architect.

Q. Prior to your taking that office or position were you at any time engaged in private practice? A. Yes, I was. Prior to my coming with the State of Montana I was in private practice.

Q. As an architect? A. Yes sir.

Q. And where geographically were you practicing at that time? A. In Great Falls.

Q. Were you a member of an architectural firm? A. Yes, I was.

Q. Would you state the name of the firm? A. The name of the firm was Bordeleau, Amundson and Hauck, Architects.

Q. How long did you practice in a private capacity? A. Approximately ten years.

Q. Would you summarize just briefly the scope of your professional experience as a private architect? What types of construction were you an architect on? A. Primarily work in the private sector, mostly schools, office buildings and commercial buildings. We did do a little work for the Federal Government and the State
(Tr. 383)
Government.

Q. And would your experience as you have outlined it in that type of work, would that include the phase of drawing plans and specifications? A. Yes.

Q. And inspecting building sites? A. Yes.

Q. The drafting of such plans and awarding or bidding on contracts? A. Yes.

Q. And supervision in the performance of contracts? A. Yes.

Q. And completion and delivery of the final project to the owner? A. Yes.

Q. Now after you terminated your private experience then you went with the State of Montana. Now would you describe to the court the nature of your office as State Architect? What are the areas of work for which you are responsible, Mr. Hauck? A. Generally we handle all the building construction for the State. This includes buildings at all the State Institutions and Universities. Specifically we do budgeting and programming, contract administration, supervision and keep the — pay the bills and keep the
(Tr. 384)
books on the projects.

Q. And what is the staff of your office? A. Well, I have architects and engineers and inspectors and accountants.

Q. Where is your office located? A. In Helena.

Q. Then if a building were to be built out here at the University of Missoula, an addition to the Law School or something like that, could I reasonably expect that that work would be done with some involvement of your office? A. Yes, we'd be completely involved in it.

Q. Now in the conduct of your duties for the State of Montana, are you ever involved in projects where there is Federal funding? A. Yes, quite extensively. On many of our projects there is Federal involvement in the way of participation cost wise. In fact we deal —

Q. Would you give us a list of the Federal agencies that you would expect to have some relationship with through the years? A. There's quite a number of them. I jotted down 12 I could read off if you'd like me to.

Q. Yes. A. The Public Health Service, Office of Education, National Guard Bureau, Veterans Administration, Bureau of Outdoor

(Tr. 385)

Recreation, Federal Aviation Agency, Department of Agriculture, Law Enforcement Agency — I'm not sure of the full name of that one — they call it LEAA, the Department of Housing and Urban Development, the National Science Foundation, the Department of Labor and the Department of Transportation.

Q. Now have you been waiting as a witness in the wings, so to speak, for testimony in this case and specifically were you here during the testimony of Mr. Templeton? A. Most of it.

Q. I'm going to, with you hypothetically build a building that Mr. Templeton hypothetically referred to in his Plaintiff's Exhibit #11 involving the State Government and —

THE COURT: Let me see 11, would you please?

BY MR. POORE: Q. Mr. Hauck, if we hypothetically built a new law library in Helena, Montana initially at least with only the State of Montana money, is that

the type of a project that your office would be actively engaged in? A. Yes.

Q. Does the term "awarding agency", does that have significance to you? A. Yes. We call it a contracting office, but it's the same thing.

(Tr. 386)

Q. Would it confuse you to consider — to use the term "awarding agency"? A. No.

Q. Now if there appears to be a need for a Supreme Court Library, who would the awarding agency of the State of Montana be? A. It would be my office acting through the Board of Examiners.

Q. All right. What would be the very first step in getting this project going and then we'll trace it through and get it completed. What is Step #1? A. Well, starting with the fact that the need has been established we would then include this in the building program that would be submitted to the Legislature. We would make an estimate to establish the cost. If the Legislature looked favorably upon the project, they would make an appropriation from some source of money. Most of the State buildings, the money is derived from the cigarette tax.

Q. Let's assume that there is an apparent need and that the Legislature approves it and awards a fund of $101,000. for the building of the Supreme Court Law Library. A. Once this appropriation was made we would enter this into our books as a project of $101,000.

Q. Would the project have a number?

(Tr. 387)

A. Yes. It would be given a title and a number for accounting purposes.

Q. Could we give the project a title? What would you call it? A. Just law library, or something, some descriptive wording. It would also be given a number for accounting purposes.

Q. Could we say 1234? A. Fine.

Q. Now in Plaintiff's Exhibit 11 there was an awarding cost of $101,000. Let's try and end up with that. What would you do as soon as the Legislature had funded a project and you had established the project? What would be the next step through your office under your supervision? A. Well, we would employ a professional architectural firm to do the design of the project. This would be a charge against the $101,000. When the design was completed and approved by all parties concerned we would start an advertisement for bids and upon receiving bids we would open them. The project would be awarded to the lowest responsible bidder and construction would commence.

Q. Would all of that be done under your supervision and control? A. Yes.

Q. Including the reviewing of the bids, the formulation of plans and specifications, the advertisement and the
(Tr. 388)
selection of the lowest responsible bidder? A. Yes.

Q. To enable us to dove tail this to Plaintiff's Exhibit 11, could we allow — I know some expense has been incurred with the architect — but could we have an awarding cost of $101,000? A. Yes.

Q. Can we assume that upon the granting of that contract for $101,000. the law library project #1234 has a project fund of $101,000? A. Yes. We'd have

to be assured that we had the money in that account before we ever signed the contract.

Q. So having assured yourself that the money was there, knowing that this is a public project that you've been told to go ahead with, you award a contract. Now let's assume this just for ease of arithmetic. I get so confused on this. The contractor enters upon the performance of his task and is paid ten successive payments over the period of time that he performed the contract. Is that consistent with the practice in your office? A. Yes.

Q. Again for illustrative purposes to the court, for my own ease would it be convenient to have at least the first nine payments equal $10,000? Would that be consistent?
(Tr. 389)
A. Yes.

Q. As an actual fact would you tell the court how if I am the contractor working on the law library project in Helena and have performed a couple of months of work, what would you expect from me as concerns obtaining some money? A. The contractor would submit a pay request or request for payment to the architect who would certify that the contractor had completed that amount of work and is satisfactory. We would review this and if we found it in order we would approve it for payment. We would deduct this one percent sales tax (sic) and we would [illegible] it to the contractor his check and we would transfer to the Department of Revenue the one percent.

Q. You may have just misspoke yourself. You said sales tax if I heard you right. Were you referring to—
A. The gross receipts tax.

Q. All right. So payment number one we are hypothetically going to say is $10,000. Now you already anticipated me there a little bit. Does the $10,000, the full $10,000. go to the contractor? A. No. It's reported in our books as a $10,000. payment —

Q. All right. And what becomes of the — A. — minus the one percent —

Q. All right.
(Tr. 390)
A. — which would be $9,900. would go to the contractor and $100. would be transferred to the Department of Revenue.

Q. So the full $10,000. payment would have been split the way you just said. Now we are certainly not going to bore the court with the obvious. The ten payments, would they be made similarly as the project went along, and let's assume in a smooth manner? You are nodding yes but you'll have to speak up. A. Yes.

Q. So I'll make those lines that are supposed to indicate something happened. Now we get down to payment number ten and again assuming that they are all equal, would it be $10,000? A. Well, it would be $11,000.

Q. I'm sorry, I guess I — $11,000. Would that payment be split again between the contractor and the Department of Revenue? A. Yes.

Q. Would the Department of Revenue get $110? A. It would get $110.

Q. And the difference would go to the contractor? A. Yes.

Q. I'm not that good on arithmetic and I don't want to be wrong here. All right now, in the course of this you

(Tr. 391)
testified that — or have you? Are you familiar with the operation of the Montana Gross Receipts Tax Act? A. I am.

Q. As concerns contractors performing work for the State of Montana either under wholly State financed or Federally and State financed projects? Is it part of your duties and responsibilities to administer the Act insofar as payments to contractors are concerned? A. Yes.

Q. Are you aware of the provisions in the Act for personal property tax refunds and income tax credits? A. I am aware of them.

Q. Let's assume, as did Mr. Templeton, that this contract is performed by a corporation and that it is profitably performed; that it had equipment in the County of Lewis and Clark such that there were taxes levied upon the equipment amounting to $346. and let's assume that — would that be consistent with what could happen in an actual case? A. I believe so.

Q. And let's assume he presented, as the testimony has shown, proof of such payment at the Department of Revenue and received a payment from the Department of Revenue, a cash payment of $346. In your experience is that property refund, does that come back and be credited
(Tr. 392)
against this project in any way? A. No.

Q. Following along with Mr. Templeton's hypothetical State Government project, if we assume that the project takes approximately one year and that the contractor incurs some Montana corporate license taxes and claims a credit of $194, is that again consistent with what you have noted with the projects that there could be such a credit? A. There could be, yes.

Q. Now have you ever in your experience administering the Act received and credited to our — to a similar law library project any part or portion of such a hypothetical corporate income tax credit? A. No.

Q. Now you have paid over or on behalf — on this law library project the total amount of withheld Montana gross receipts tax in the amount of $1,000, have you not? A. Yes.

Q. At least that is what we intend to follow along — A. Yes.

Q. — on the hypothesis that was represented in Plaintiff's Exhibit 11. In your experience has the Department of Revenue, pertinent to a similar project and specifically our hypothetical law library project, ever remitted or
(Tr. 393)
paid over to your office any payments or portions of payments of the gross receipts tax that have been paid to them? A. No it never has. You might correct that. That is supposed to be 1,000 instead of 100,000.

Q. Thank you, Mr. Hauck. Now as that contract is performed and these monies are expended, am I correct in assuming that the fund in the — the project fund 1234 reduces? A. Reduces?

Q. As you pay these monies out of this fund do you gradually deplete the law library project fund? A. Oh, yes.

Q. These are warrants issued on the project fund and paid out and deplete the fund gradually? A. Yes.

Q. Now from the way I've taken you through it so far would it be correct that at the end of the completion of the project we would have paid out the $101,000. award cost? A. Yes. We'd have to balance to the contract amount.

Q. You have to balance to the contract amount so that the total payment from the project fund is $101,000? A. Yes.

Q. And of that, how much would have been paid to the contractor? A. 100,000.

(Tr. 394)

Q. How much would have been paid to the Department of Revenue? A. A thousand.

Q. Now what would be the cost to your department of the law library project? What would you show as the cost of that? A. We would show $101,000.

Q. Would you show any credits received from the Department of Revenue? A. We'd never receive any.

Q. From any contractor? A. We'd never receive any.

Q. From any source whatsoever? A. If there was any credits to be made from some other source we would show it as a credit.

Q. If it was a joint effort with the Federal Government in some manner? A. There's a remote possibility.

Q. Let's assume that the same project was built with some form of matching Federal funds. Without boring the court on the details of that, could you just summarize what if any differences there would be if matching funds, say, on a fifty fifty basis were involved?

MR. STRATTON: I would like to make a technical objection. If defense counsel is using our hypothetical
(Tr. 395)
on Plaintiff's Exhibit #11, it was testified that the column pertaining to the United States was an example

of an Army Corps of Engineers project and the witness also testified that other Government agencies might do it differently, especially in a case where there are matching funds. So if defense counsel is going to use a hypothesis I believe that he would have to use a new column to illustrate that point rather than using our column.

THE COURT: Well, with your explanation this will show what is done I think. Go ahead.

BY MR. POORE: Q. The question I intended to ask you was would the expenditure of funds, the process you have outlined, be different if there was an infusion of, say, Federal monies of 50 percent into the hypothetical project? A. The fact that there was Federal participation in the project, we would do nothing differently. It would still be reflected on our books as a $101,000. project.

Q. If the Federal participating funds were truly 50 percent would you have actual dollar contribution to your $101,000. fund of one half of $101,000. or $50,500. from the Federal Government? A. Yes.

Q. And then once that infusion of funds was established the
(Tr. 396)
pay out would be the same, or would it? A. It would be the same.

Q. And the cost to the State of Montana on this particular project #1234 for the law library building in Helena, Montana would be what amount, sir?

MR. STRATTON: I object, Your Honor. The witness testified the cost to his particular agency, not to the State of Montana.

MR. POORE: And I asked to the State of Montana.

MR. STRATTON: I don't believe the witness is qualified to tell about the cost to the State. He can only tell about the cost to his particular agency.

THE COURT: Overruled.

BY MR. POORE: Q. What is the cost, Mr. Hauck? A. It would be $101,000.

Q. Now shifting over to a different area of your expertise, again so as to not unduly lengthen your examination or your testimony, based upon your experience in both the public and the private sector of construction work, your experience in building public buildings for the State of Montana with both solely Montana funds and Federal and Montana funds, could you summarize for us what differences, if any, you note in the awarding and performance of a public contract versus a private contract where the two contracts are substantially the
(Tr. 397)
same as concerns the hypothetical project being constructed? If we could again use a law library project hypothetical and a private library for the Anaconda Company, now would there in your opinion or in your experience be any differences from the beginning of the letting of the contract right through to the end and if so could you lead us through and point out such differences? A. Well, generally speaking in the public sector of contract administration —

Q. Could you speak just a little bit louder, please? A. In the public sector of contract administration there are many laws and rules and regulations that are promulgated by legislatures or bureaucratic officers that tend to make the public contracting much more cumbersome and involved, much more paper work, much more detail in the line of justifications and documentations and audit trails and this type of thing and, as far as I am

concerned, tends to make public contracting more cumbersome, more time consuming and with the ultimate result of a higher project cost. In the private sector things are much more streamlined and unrestricted and, consequently, I think that most contractors agree, or at least they have told me, they would prefer to bid. It's much simpler to bid on

(Tr. 398)

construction in the private sector than in the public sector. Now there are many things that contribute to this. The laws require contractors to provide bonds, for example bid bonds and performance bonds and payment bonds. They require full coverage of every conceivable kind of insurance.

Q. Now are you talking about public or private? A. The public sector. These are required by laws and regulations.

Q. Bid bonds, payment bonds and what is the other type? A. Performance bonds.

Q. And are those required in the private sector? A. They are not required. In fact it's up to the owner whether he wants them or not. They do involve costs and many owners because of the cost, if they are familiar with the contractor and his financial stability and a few things like this, they will ignore that type of thing. Anyway, it's an optional thing in the private sector. It is not optional in public contracting. Public contracting requires competitive bidding and awards to the lowest bidders. In the area of insurances, they require all kinds of liability insurances and property damage, workmen's compensation, fire and extended coverage and all these add additional cost to projects. That again is optional in the private sector.

(Tr. 399)

Q. Jumping back to the competitive — the award to the contractor, the lowest responsible bidder, is that required in the private sector? A. No, it's not. In fact I would estimate from my experience that probably more work is done in the private sector not bidding or not doing it on a competitive bidding basis. They use time and material contracts. They use negotiated contracts. They invite only those contractors to give a price — if they do bid, they do it by what is called bidding by invitation only. This is not allowed in the private sector (sic). There are ways that they can control the costs on their projects in the private sector that are not available in the public sector because of rules or regulations or laws.

Q. You then were touching on insurance when I interrupted you, Mr. Hauck. A. I think I said everything I want to say about insurances. Public work also requires licenses for private contractors. It's another job cost. In the public sector many times they put in the contract document stipulations for liquidated damages, warranties and guaranties. The contractors are aware of the fact that in the public sector the supervision criteria are far more stringent. The contractor is allowed no latitude of his own. He is

(Tr. 400)

literally led through the project. These type of things in my estimation tend to add costs to public contracting that are not prevalent in private contracting. Just the paper work blizzard that has evolved in the last few years in public contracting is an awesome thing to a contractor. An example of that might be on change orders. The State requires six copies of all change orders. If there is any Federal involvement we require

eight copies of change orders. The contractor has to prepare all these. The justification and documentation that is required to satisfy everybody concerned with the change order is getting to be voluminous. Just the signatures required. On a typical change order in Montana it requires seven signatures just to get it approved. This causes time delays and time is money to a contractor especially if he has to provide interim financing while waiting for payments on his monthly pay requests on change orders. Does that answer your question?

Q. Yes, I believe it does. Well then, do you believe there is a real and substantial difference between public contracts, the letting, awarding and performance of public contracts, as opposed to the private contracts? A. I would say administratively and legally in my opinion there is a pretty wide break between the two.

Cross-Examination by Mr. Stratton of Mr. Hauck:

(Tr. 405)

Q. Now have you ever worked for the Montana Treasurer? A. No.

Q. So in your hypothetical, Defendant's Exhibit C, I believe — is that correct?

MR. POORE: That's correct.

BY MR. STRATTON: Q. Once you pay, I guess it is on your hypothetical, the $1,000. to the Department of Revenue, you don't actually know what happens to that $1,000. when it is paid? A. No, I don't.

Q. You don't know what the Department of Revenue does with that money? A. No.

Q. And you have no knowledge of the internal auditing of the Treasurer of the State of Montana? A. I

know they do an internal audit and that's about the extent of it.

Q. You have no idea of the internal workings of the State Treasurer? A. No.

Q. So then when you testify to the cost you can only testify as to the cost to your agency, not to the State of Montana, is that correct — A. Well —

(Tr. 406)

Q. — as far as the internal auditing procedures? A. As far as auditing procedures, yes.

Q. Would you like to explain then? A. I was going to say that we in our contracting and accounting on construction jobs are acting on behalf of the State of Montana.

Q. I'm sorry? A. I say in our job of contracting office for the building program, we are acting on behalf of the State of Montana.

Q. I see. But that is just within the scope of your agency? A. That's true.

Q. Would an example of a large private construction project include shopping centers, department stores and bank buildings? A. Yes.

Q. Would an example of a large public construction project include a United States Post Office or a G.S.A. office building? A. Yes.

Q. Now considering for the moment the private buildings that I cited and the public buildings that I cited, is the public project intended for the use of the public? A. Yes.

Q. Is the private project intended for the use of the public?

(Tr. 407)
A. Yes.

Q. So far as the use of the public is concerned, there is no difference between private and public — A. No.

Q. — construction? A. No.

Q. Now assuming the Federal G.S.A. building, would the State of Montana in any way regulate the use of the G.S.A. public building, United States Government building? A. The use?

Q. Yes. A. No.

Q. Now assuming again you have a United States Government G.S.A. office building, if it is inadequate in some way, wouldn't it expose the public to danger? A. Yes.

Q. If a private project were inadequate in some way, would that not expose the public to danger? A. Yes.

Q. And wouldn't the Federal Government without any supervision usually take corrective steps if there is inadequacy in their buildings? A. I would assume so.

Q. Now consider the Federal construction project, a G.S.A. building or post office. Would the State of Montana in
(Tr. 408)
any way interfere with or review the qualifications and experience of the contractor performing the project for the United States? A. Not that I am aware of.

Q. In the performance of a public project you testified that sometimes bonds are required. Is it true in the performance of private construction projects of large dollar volume that sometimes bonds are used? A. They might.

Q. Is it also true that a building that might be constructed for a private corporation or private individual may be leased to a public agency? A. That happens quite often.

Q. It happens quite frequently? A. Yes.

Q. Do you recall having your deposition taken on the 4th day of December in Great Falls, Montana? A. Yes, I do.

Q. Do you have a copy of that deposition?

MR. POORE: I do. And I don't believe there are any markings on it. This copy has Mr. Hauck's name. Is that the one?

MR. STRATTON: Yes.

Q. To be brief and to the point, on Page 11 on Line 8 I asked the question, the difference between
(Tr. 409)
100 percent Federally funded projects, your personal knowledge of those projects, and private projects would your knowledge have to be pure speculation as to the Federal projects? A. The 100 percent pure Federal projects, yes.

Q. On Page 15 I asked the question is not the Federal Government itself a self insurer. A. I would assume so on a hundred percent Federally funded project. However, on projects involving Federal participation we put the insurance as terms of the contract.

Q. On Page 37, Line 23, as to Federal codes, building codes, I asked the question referring to the United States I asked the question perhaps the United States meets even more stringent codes, would you say? Would you tell me what your answer was? A. I said that they could be.

Q. Then again on Page 45, Line 16 the question was "So that you wouldn't know of any differences, then, between these 100 percent Federally funded construction projects, and private projects, would you?" and please read your answer. A. The answer was yes.

Q. Is that your testimony today as well? A. Yes.

(Tr. 410)

Q. Then on Page 49 I asked a question concerning tax classifications. At Line 21 your answer, please?

MR. POORE: Could you ask the question for the record so we know?

BY MR. STRATTON: Q. I asked a question concerning "Do you think those differences merit a difference in tax classification?" That was on Line 17, Page 49. Your answer is at Line 21, sir. A. The answer is "Well, I don't feel that I am qualified to talk on tax classifications."

Q. Is that your testimony today as well? A. Yes.

Q. Then on Page 55, Line 9 you answered ". . . but I deal strictly with the State building program." Is that correct? A. Yes.

Q. Then on Page 57, Line 19 referring to the Federal Government I asked the question "Do they actually tell you how to administer these contracts, and so on?" At Line 21 would you please read your answer? A. "Pretty much, yes . . ."

Q. "Do they tell you how to supervise, and how to inspect?" Referring to the Federal Government on partially funded Federal projects that you work on. Would you please read your answer on Line 24?
(Tr. 411)
A. On Line 24 I said "Yes. . . ."

Q. Is that your testimony today, sir? A. Yes.

MR. STRATTON: I have no further questions, Your Honor.

THE COURT: Redirect?

MR. POORE: Yes, Your Honor.

Further Examination by Mr. Poore of Mr. Hauck:

Q. Mr. Hauck, is there any requirement in your office for the insurance of public properties, the carrying of insurance on properties that your office supervises or builds? A. We maintain insurance on all State properties.

Q. As to this hypothetical law library project, would this project be insured through your office for replacement insurance, fire and extended coverage? A. This would be entered in at the price of $101,000.

Q. Is there any requirement in your office for the listing of private properties in dollar values? In other words, an inventory of properties? A. You mean State owned?

Q. Yes. A. Yes.

Q. What would this project #1234 be valued at in your office? A. Well, again upon completion it would be entered at the
(Tr. 412)
value of the contract or $101,000.

Q. And is there any requirement through your office of establishing and setting up a depreciation schedule on State of Montana buildings? A. We carry a depreciated value insurance so after the building is entered

into the insurance file or insurance records of the State, they start a depreciation schedule.

Q. And what would this building be started at on this schedule? A. It would be entered at $101,000.

Supreme Court of the United States

No. 77-1134

MONTANA, ET AL.,

Appellants,

v.

UNITED STATES

APPEAL from the United States District Court for the District of Montana.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

May 22, 1978

A true copy Michael Rodak, Jr. Test: Clerk of the Supreme Court of the United States by Frances J. Corfon, Deputy.

State Publishing Co., Helena, Mont.

Supreme Court, U. S.
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No. 77-1134

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF MONTANA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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STATE OF MONTANA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee, the United States of America, moves that judgment of the district court be affirmed.

STATEMENT

This is a direct appeal under 28 U.S.C. 1253 from a judgment of a three-judge district court (1) declaring that Title 84, Chapter 35, Revised Codes of Montana, 1947, as amended, and the rules and regulations promulgated thereunder, violate the Supremacy Clause of the United States Constitution insofar as they apply to the United States of America, its contractors, subcontractors and those with whom it deals, and (2) permanently enjoining the application of that chapter against those persons (J.S. App. 1-3).[1]

[1] In its judgment, the court ordered that the federal government's claim for refund of the license fee and gross receipts tax be determined by a single-judge district court (J.S. App. 3).

The pertinent facts are as follows:

Section 84-3505, Revised Codes of Montana (1975 Cum. Supp.) (J.S. App. 40) imposes upon public contractors a license fee of one percent of gross receipts derived from public construction contracts performed in Montana for federal, state or local governments.[2] A "public contractor" is any person who submits a proposal, or enters into a contract, to perform any public construction work in Montana for the federal, state or local governments (§ 84-3501(1), Revised Codes of Montana (1975 Cum. Supp.) (J.S. App. 38)).

Private contractors, *i.e.*, those not engaged in government work, are not subject to the gross receipts tax. Nor are the gross receipts of "public contractors" derived from private work subject to the tax (J.S. App. 40-41, 90). Thus, receipts from construction work performed for federal, state or local governments in Montana are subject to a tax that receipts from private work are not (J.S. App. 88, 90).

A contractor may credit against the gross receipts tax the taxes paid on his personal property used in his contracting business in Montana. He may credit the balance of the gross receipts tax against the Montana individual income tax or the corporate license tax (*i.e.*, corporate income tax) (§ 84-3514, Revised Codes of Montana (1975 Cum. Supp.) (J.S. App. 47-48)). The effective rate of the gross receipts tax thus varies among public contractors because of variations in their personal property and income taxes, but it averages approximately one-half of one percent of gross receipts (J.S. App. 11-12, 87-88, 90).

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[2]There is also an annual license fee of $10 to $200 (depending upon the dollar amount of construction the license authorizes).

The United States brought this action in the United States District Court for the District of Montana in April 1971 against the State of Montana, its Department of Revenue and its Director of Revenue. It sought, *inter alia*, (1) a declaratory judgment that the imposition of the gross receipts tax upon the United States, its contractors, subcontractors or those with whom it dealt violated the Supremacy Clause of the United States Constitution, (2) a permanent injunction against imposing the tax on those persons, and (3) a refund of the taxes collected from those persons (J.S. App. 80-81).[3] The case was continued on stipulation pending resolution in the Montana state courts of *Peter Kiewit Sons' Co.* v. *Department of Revenue*, 166 Mont. 260, 531 P. 2d 1327 (J.S. App. 49-51).

In *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 (*Kiewit #1*), (J.S. App. 105-123) the contractor, in litigation financed and directed by the United States, sought a refund of the gross receipts tax that it had paid on amounts received under contracts with the Department of the Army, contending that the tax unconstitutionally discriminated against those who dealt with the United States. Under its contract with the Department of Army, Kiewit was prohibited from taking advantage of the credit provisions of the gross

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[3]The United States also sought to have the license and regulatory provisions of Title 84, Chapter 35, Revised Codes of Montana, 1947, as amended, declared unconstitutional and to enjoin their enforcement against contractors dealing with the United States (J.S. App. 78, 80). The Montana Supreme Court in *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 152-153, 505 P. 2d 102, 109-110, determined that the regulatory provisions of the Montana Act were not applicable to the United States, its contractors or its subcontractors (J.S. App. 7, n. 2, 78-79, 121-122).

receipts tax.[4] The Montana Supreme Court determined, *inter alia,* (1) that the gross receipts tax was a revenue enforcing measure, (2) that but for the prohibition in the federal contract against using the credits, Kiewit could have recovered most if not all of the gross receipts tax paid[5] (J.S. App. 111-113), and (3) that the tax did not unconstitutionally discriminate against contractors dealing with the United States. Accordingly, Kiewit was denied the refund sought (J.S. App. 85-86, 105-123).

During the period that the present case was continued, the Montana Supreme Court decided *Peter Kiewit Sons' Co.* v. *Department of Revenue,* 166 Mont. 260, 531 P. 2d 1327 (*Kiewit #2*), which differed from *Kiewit* #1 only in adjudicating the amounts of gross receipts taxes due at different times. The Montana Supreme Court held that its decision in *Kiewit #1* was *res judicata* on the constitutional challenge to the gross receipts tax (J.S. App. 124-130).

After the decision in *Kiewit #2*, the present case was heard on the merits. The appellants contended that the imposition of the gross receipts tax upon contractors dealing with the United States did not violate the Supremacy Clause of the Constitution because the tax was also imposed upon contractors dealing with the State, and that the United States was bound by the decision of the Montana Supreme Court in *Kiewit #1* (J.S. App. 9-10, 20-35, 94-100). The United States' contentions, sustained by the court below with one judge dissenting, were,

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[4]This contract provision, and the policy embodied in it, have since been abandoned, and contracts after 1971 have required contractors to take advantage of all credits, including credits available for back periods (J.S. App. 11, 91).

[5]Kiewit incurred a personal property tax of $35,803.22 on its heavy equipment. It sought a refund of gross receipts taxes of $8,726.47, and was entitled under Montana law to a refund of that amount (J.S. App. 109, 112).

inter alia, that the gross receipts tax upon contractors dealing with the United States violated the Supremacy Clause of the Constitution because it discriminated without justification against those contractors and in favor of contractors dealing with private entities, and imposed upon the United States costs greater than those borne either by private entities or by the State of Montana (J.S. App. 8-9, 13-17, 92-94). The district court also held that the United States was not bound by the *Kiewit* litigation (J.S. App. 15).[6]

ARGUMENT

1. The district court correctly held that the Montana gross receipts tax discriminated against the United States and those with whom it dealt, and thus violated the Supremacy Clause of the Constitution.

This Court has consistently held that "a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals" (*United States* v. *City of Detroit,* 355 U.S. 466, 473). This proscription is inherent in the federal government's immunity from state taxation under the Supremacy Clause. See, *e.g.*, *M'Culloch* v. *Maryland*, 4 Wheat. 316; *United States* v. *County of Fresno,* 429 U.S. 452, 463-464; *Phillips Chemical Co.* v. *Dumas School District,* 361 U.S. 376, 385-387; *Moses Lake Homes* v. *Grant County,* 365 U.S. 744, 751.

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[6]The opinions of the district court are reported at 437 F. Supp. 354.

In *County of Fresno, supra*, this Court upheld a county tax, authorized by state law, on the possessory interests of those who occupied federally-owned houses on tax-exempt government land. This tax corresponded to the tax which California imposed on the owners of private land, which was "presumably reflected" in the rent which private lessees paid. In upholding the tax on federal lessees, the court reiterated the rationale of *M'Culloch, supra*, that states cannot impose oppressive taxes bearing on a federal function, but taxes bearing on both private and federal interests are subject to a "political check against abuse," and thus are permissible. 429 U.S. at 458. "So long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory * * *." *Id.* at 460. See *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (gross receipts tax imposed on both private and public contractors). Therefore, "the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." 429 U.S. at 462 (footnote omitted). If the tax had not been imposed on private lessees, it would have been invalid as to the federal lessees, for it then would have been discriminatory. *Id.* at 463 n. 11, 465.

The present tax is not "imposed equally on other similarly situated constituents of the State" because it is not imposed on private contractors. It is imposed on federal contractors. Thus its unconstitutionality is clear under the principles of *M'Culloch, supra*, and *County of Fresno, supra*.

The appellants seek to distinguish this situation from *M'Culloch* by pointing out that the tax is imposed not only on contractors for the federal government, but also

on contractors for the state. But, as we now discuss, that fact does not, in the circumstances of this case, suffice to save the tax from unconstitutionality.

If a contractor working on a job for a private party buys a $10 bag of cement and pays a $1 tax on the purchase, the state gains $1 at the expense of the private party. If a contractor working on a contract for the State buys a $10 bag of cement and pays a $1 sales tax, the State reimburses him $11, and gains nothing. If a contractor on a Federal job makes a similar purchase, the federal government reimburses him $11, and the state gains $1 at the expense of the federal government. The state is, in a sense, treating itself better than the federal government, because it pays no tax and the federal government does; however, the tax is nondiscriminatory because the federal government is treated exactly like the private party. Thus the tax does not violate the Supremacy Clause, for the reasons stated in *M'Culloch* and repeated in *County of Fresno*: the state legislature will presumably not impose oppressive taxes on its citizens, so that any tax which puts the federal government to the same burden as the state's citizens is constitutional. In the above example, the fact that the state "pays" no tax is irrelevant; the non-payment simply reflects the fact that the state is transferring money from its left pocket (the contracting office) to its right (the tax collector).

If the tax on private parties is eliminated in the above example, the discrimination against the federal government is evident. The private party pays no tax; the state pays no tax; only the federal government pays tax. There is no check to prevent the legislature from raising the tax to oppressive levels. Its citizens will not protest and the state, though it transfers larger amounts of money from pocket to pocket, in the end pays nothing. The federal

government pays the tax to the state through its contractors, and the discriminatory effect is clear. The tax is invalid under the Supremacy Clause. *M'Culloch* v. *Maryland, supra.*

Thus it is evident that the tax on private parties is the only real protection that the federal government has against discrimination. Once that is eliminated, the federal government stands alone as a true taxpayer to the state. The state's claim that its own contractors must also pay the higher tax is illusory; whatever the contractors pay to the state is reimbursed by the state[7] and, no matter how high the tax, the state pays it from one pocket to another.

The tax in this case is not imposed on private parties. It is imposed only on contractors for the federal government and, ostensibly, on contractors for the State. Because Montana does not, as a practical matter, pay a tax to itself, the fact that the tax here is nominally "imposed" on state contractors is immaterial.

This leaves only the matter of credits. The credits work here to allow a contractor, first, to reduce his gross receipts tax by the amount of personal property tax paid. Then, each contractor pays the gross receipts tax and, in turn, credits the amount paid against his income taxes.

In effect, then, the gross receipts tax is a hostage to other taxes. It goes to satisfy property and income tax obligations. If the amount of gross receipts taxes owed was always insufficient to pay the personal property tax and income tax, there would in effect be no gross receipts

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[7]The fact that the state reimburses the contractor follows from the hypothesis that the tax is not imposed on private parties. Any tax not reimbursed, directly or indirectly, must be absorbed by the contractor—a private party.

tax at all. Contractors' payments earmarked for gross receipts taxes would reduce other tax obligations, and thus be swallowed up by them. If that were the case, there would be no dispute.

However, the record shows here that such is not the case. The gross receipts taxes are only half-consumed when they are applied to satisfy other taxes; thus, over time, the effective rate of the gross receipts tax has been one-half of one percent. This is a small tax, but it is a real one. It is not paid by private parties. It is not, as shown above, paid in any real sense by the state. It is paid only by the federal government. Therefore it is discriminatory and cannot stand under the Supremacy Clause.

The opinion of the Montana Supreme Court in *Kiewit #1,* upon which appellants rely, reasons that, because state contractors and United States contractors alike pay the tax, the state is treating the federal government as well as it is treating itself and thus there is no discrimination. See J.S. 19-20. But as shown above, such reasoning is fallacious.

The dissenting judge below argued (J.S. App. 28) that the government's reasoning "if followed to its logical conclusion" would effectively invalidate state gross receipts taxes upon all contractors, or sales taxes imposed upon all purchasers of goods, which taxes were upheld in *Alabama* v. *King & Boozer,* 314 U.S. 1, and *James* v. *Dravo Contracting, supra,* Appellants adopt this contention (J.S. 12-16). The answer is simply that, for the reasons shown above, the reasoning is not carried "to its logical conclusion." Taxes such as those in *King & Boozer* and *Dravo Contracting* are valid, even when imposed on a contractor for the federal government, because they pass muster under *M'Culloch, supra,* and *County of*

Fresno, *supra*: they are imposed equally on all similarly situated constituents—provate as well as governmental—in the state. The tax involved here is not.[8]

Appellants contend (J.S. 16-25) that the district court misapplied the holding of *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376. According to the appellants, *Phillips Chemical* requires only that, in taxing those with whom the federal government deals, the state must treat such persons "as well as it treats those with whom [the state] deals itself." 361 U.S. at 385. Because the state here taxes its own contractors at the same rate it taxes federal contractors, the appellants conclude, as the Montana Supreme Court did, that the state has met the test of *Phillips Chemical* and the tax is therefore valid.

In *Phillips Chemical*, the state of Texas taxed lessees of federal property at a higher rate than it taxed lessees of state property. The Court observed that "it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." 361 U.S. at 385. It found the special tax for federal lessees invalid because "it still remains true, as it has from the time of *M'Culloch* v. *Maryland*, 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals." *Id.* at 387.

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[8]The fact that the tax is imposed on receipts from local governments, school districts and other governmental entities makes no difference, even assuming that those entities, like the federal government, cannot recoup those payments occasioned by the tax (see J.S. App. 12). Once it is shown that the State is discriminating against the federal government, the tax must fall; its constitutionality cannot be restored by showing that the state is also discriminating against other governmental entities.

Appellants focus on the language requiring the state to treat federal lessees as well as it treats state lessees and from that point conclude that the tax here is valid because it is imposed on both federal and state contractors. This superficial analogy is not valid, however, because, as shown above, the burden of the tax falls on the federal government and not on the state government. Contrary to appellants' assumption, *Phillips Chemical* announced no new test of discrimination, much less a test that could be satisfied by the scheme which appellants have implemented here. It explicitly adhered to the principles expressed by this Court in *M'Culloch*: if the tax discriminates against the federal government or those with whom it deals, the tax is invalid. As shown above, such is the effect of this tax.

Finally, appellants' attempt (J.S. 23-25) to bring the present case under the aegis of *County of Fresno, supra*, is unpersuasive. Their claim is that the tax here was "uniform on all taxpayers similarly situated—i.e., contractors having construction contracts for *any* public entity * * *." J.S. 24. Such an approach defines the relevant "market" too narrowly. It would for example, validate a statute which taxed occupants of property owned by federal, state, or local governments but exempted occupants of privately-owned property. Such a tax would fail the *Fresno* test because federal lessees would be "worse off * * * than those * * * in the private sector," 429 U.S. at 465. The fact that the state lessees might also be worse off would not, of course, make the tax any the less unconstitutional as applied to the federal lessees.

2. The district court also correctly held that the federal government was not precluded from litigating the merits by the decision in *Kiewit #1*, a case that one of its contractors litigated. The appellants contend (J.S. 26), as the dissenting judge did (J.S. App. 23-27), that the United States is barred from litigating the merits of this case

under the rationale of *England* v. *Medical Examiners*, 37[illegible] U.S. 411, and under the doctrine of collateral estoppel.

a. *England* held that parties who initially present their federal claims to a federal court cannot litigate those issues in that court where (1) the federal court abstains and sends the parties to state court for a resolution of state law grounds, (2) those parties "freely and without reservation" litigate all their claims in the state courts, (3) the parties in each action are identical, and (4) the state court has jurisdiction over the parties. These conditions are not met here.

First, the district court never invoked the doctrine of abstention. The parties to this litigation merely agreed to continue the case while the state courts considered *Kiewit #1*, in which the federal government appeared only as *amicus curiae*. Second, in agreeing to the continuance, the United States never "freely and without reservation" submitted its claims to the state court. The state court never acquired jurisdiction over the federal government. Indeed, in this action, the federal government seeks a judgment of the effect of the tax with respect to all of its contracts. The *Kiewit* case involved only one type of contract—and that one no longer effective. See note 4, *supra*. The rule in *England* thus did not prevent the district court from reaching the merits of the dispute here.

b. The decision in *Kiewit*, moreover, did not determine the issue here. Because of the amount of Kiewit's heavy equipment in Montana, it was not established that the gross receipts tax here in question would have imposed any financial burden upon the contractor. Had Kiewit claimed the credit, its personal property tax could have eliminated all of the public contractor's gross receipts tax. Indeed, the Montana Supreme Court proceeded upon the assumption that there might in all cases be "a total washout of the 1% gross receipts payments" (J.S. App. 109, 111-113).

In this case, to the contrary, the effective rate of the tax the United States ultimately bore, after taking all credits available, will be approximately one-half of one percent of the contractors' gross receipts (J.S. App. 11, 87, 88). Considering principles of collateral estoppel as well as *England*, therefore, the district court was correct in holding that the decision of the Montana Supreme Court in *Kiewit* was no barrier to its judgment in this case.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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MAY 1978.

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In the Supreme Court

of the United States

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No. 77-1134

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- vs -

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Appellants.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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Pursuant to Rule 16(4) of the rules of this Court, the Appellant, the State of Montana, files its Brief in opposition to Appellee's Motion to Affirm.

— STATEMENT —

The notice of appeal in this action was filed on December 15, 1977, thereafter on February 13, 1978, the Appellant filed its Jurisdictional Statement which was received and served on the United States on February 21, 1978. On April 6, 1978, Appellee requested a fourteen day extension to and including April 26, 1978 within which to file its response. On April 7, 1978 by letter from the Clerk of this Court,

the request was granted. On May 5, 1978, ten days after the date set for filing said responsive pleading, the Motion to Affirm was filed by Appellee. Appellants were served with said Motion on May 8, 1978. On May 10, 1978, Appellants filed by way of a telegraphic message, a request of this Court to postpone consideration of the matter until May 18, 1978 giving the Appellants an opportunity to file their brief in opposition to the Motion to Affirm.

ARGUMENT

ECONOMIC IMPACT OF TAX NOT SOLELY ON FEDERAL GOVERNMENT

The basic theme of the Appellee's Motion to Affirm (M.A.) is that the economic impact on the State of Montana is wholly illusory. Hence there is no check or balance on the state taking advantage of the federal government by increasing the tax and discriminating against the federal government.

Such argument ignores the essential fact that the tax is on all Montana public contractors. Any economic impact that the tax might have on a public property owner is borne not only by the state and the federal government but by every public body, including but not limited to every school district, special improvement district, city, county, irrigation district, or any other public board, body, commission or agency which constructs public works in Montana. (Sec. 84-3501, R.C.M. 1947, as amended).

It simply is not true that the gross receipts tax paid to the State of Montana, by a contractor building a sewage lagoon for the incorporated hamlet of Whitehall, Montana, somehow beneficially filters

down to the City of Whitehall in a "right hand pocket to left hand pocket" transfer.

The vast host of non-state, non-federal public projects in Montana (every public construction job above $1,000) provides a reliable intense and vocal bulwark which obviates the concerns raised by the Appellee. There is no more tax and expense conscious entities in our society than school boards, rural town councils and irrigation district boards.

These non-state and non-federal public entities are the "other similarly situated constituents of the State" required by Fresno[1]. They share any economic tax impact with the state and federal governments and insures that the state legislature will not utilize a discriminatory tax on the federal government alone. Every school board member is an intensely motivated private taxpayer acting as a fiduciary for his fellow taxpayers. The governing bodies of these non-state, non-federal, public entities are the tax-alert distillation of the citizens of Montana whom the Appellee claims are unaffected by this tax (M.A. 7). There is more alert and vocal citizen participation through these entities than would result simply because the tax was levied on private contractors. It simply is not true — though it is the basic theme of the Appellee that:

> "The private party pays no tax; the state pays no tax; *only the federal government pays tax.* There is no check to prevent the legislature from raising the tax to oppressive levels. Its citizens will not protest and the state, though it transfers larger amounts of money from pocket to pocket,

---

[1] *U.S. v. County of Fresno*, 429 U.S. 452, 50 L.Ed. (2d) 683, 97 S.Ct. ____, (1977)

in the end pays nothing. The federal government pays the tax to the state through its contractors and the discriminatory effect is clear." (M.A. 7)

In truthful and accurate manner the foregoing could be rewritten:

"The private citizen as owner of every school, every sewage, drainage or irrigation district, and owner of every city and SID property feels the economic impact of the tax paid by its contractors. The state likewise feels any economic burden of the tax because there is no grandiose, monolithic State of Montana exchequer; and each bureau or department must budget and account for its own separate funds (as does the federal government). There are checks and balances at the local (school) levels against excessive taxation. The private citizens serving on school boards etc. will protest — and protest most vocally — if the economic impact of the tax on school construction etc. gets out of hand. Tax revenues from the Act are not transferred willy-nilly from pocket to pocket either at the state level or from the state to non-state public entities. The federal government neither solely pays the tax nor does it suffer any economic impact not proportionately shared by non-state public agencies and by the state itself. The tax is not discriminatory."

DECISION INVALIDATES STATE TAX STATUTES

Appellees have failed to satisfactorily refute the contentions raised by the Appellant and the Amici as to the impact of the majority opinion entered in the District Court. As Judge Kilkenny in his dissent pointed out, if the opinion of the majority is allowed to stand, "This reasoning, if followed to its

logical conclusion, would effectively invalidate the state taxes routinely upheld in *Alabama v. King and Boozer,* 314 U.S. 1(1941), and *James v. Dravo Contracting,* 302 U.S. 134(1937)." (J.S. App. 28). In discussing that very quote, the Appellee glibly states that the reasoning cannot be carried to its logical conclusion (M.A. 9). In support of that Appellee argues that if taxes were levied on the private sector there could be no discrimination.

What Appellee is trying to do is re-write the opinion of the majority so as to alleviate the effect of this decision. However, were this Court to grant Appellee's Motion to Affirm, what would remain would not be the argument of Appellee, but the language used by the majority. That language, which occasioned the filing of the Amicus briefs by the 24 states and territories, must be reviewed and decided by this Court.

Implicit in the majority opinion is the following rule: If a state tax results in state revenue the effect of such revenue creates a threshold of discrimination against the federal government because there is no corresponding revenue generated for the federal government to offset the federal government's increased costs. Such language in a decision affirmed by this Court will lead to numerous suits attacking the validity of state taxes using this very theory. It is imperative that this Court take jurisdiction of this matter so as to correct this clearly erroneous holding. The language and reasoning of this decision has created an issue of national importance and requires this Court to assume jurisdiction and decide the question.

ENGLAND DOCTRINE AND COLLATERAL ESTOPPEL

The rationale of *England v. Medical Examiners,* 375 U.S. 411, 11 L.Ed. (2d) 440, 84 S.Ct. 461 (1964) bars reconsideration of this issue. The Appellee misconstrues the holding of *England* supra, and the record as to the control of the Appellee in *Kiewit and Sons, Inc. v. State Board of Equalization,* 161 Mont. 140, 505 P.2d 102 (1975) (*Kiewit* No. 1).

The *England* decision *supra,* does not require the Federal District Court to specifically enter an order of abstention, when, as in this instance the parties, (United States acting by and through Peter Kiewit) by agreement requested an abstention of the federal court proceedings pending a determination in the state court. Further, the record in this matter is devoid of any act on the part of the Appellee which in anyway limited the issues which were submitted to the Supreme Court of Montana in *Kiewit* No. 1. Rather, the Appellee, acting by and through its nominee, Peter Kiewit, freely and without reservation submitted all of its *then known* claims for determination. It wasn't until after the Montana Supreme Court had decided *Kiewit* No. 1 and the second case, *Kiewit and Sons, Inc. v. Department of Revenue,* 166 Mont. 260, 531 P.2d 1327 (1975) (*Kiewit* No. 2) did the Appellee then elect to return to the federal forum and amend its complaint raising "new found" issues. If the rule in *England* is to have application, it must be applied in this situation.

Finally, the specific issue of whether or not the Contractor's Gross Receipts Tax discriminated against the Appellee was raised and decided by the

Supreme Court of Montana in *Kiewit* No. 1, (J. S. App. 119) and under the doctrine of Collateral Estoppel, can not be re-litigated. Appellee chose to have that issue presented to the Montana Supreme Court, contrary to the statement made in its Motion to Affirm (M.A. 12). Appellee has attempted to gloss over this important fact by arguing that in *Kiewit* No. 1 it was not proven that the tax imposed any financial burden on the contractor. Such a position does not respond to the thrust of the issue as clarified by Judge Kilkenny in his dissent (J. S. App. 23) and Appellant's Jurisdictional Statement (J. S. 26), and the Appellee should not be allowed to again re-litigate this question.

CONCLUSION

Appellants move this Court to accept jurisdiction and decide these far-reaching issues.

Respectfully submitted,

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Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF OF APPELLANTS

Opinion Below

The judgment and opinion of the three judge Federal District Court for the District of Montana are reported at 437 F.Supp. 354 and are set forth in the separate Appendix to Jurisdictional Statement, (J.S. App.) commencing respectively at pages 1 and 5.

Jurisdiction

Jurisdiction of this Court was invoked pursuant to 28 U.S.C., Section 1253, this being an appeal from a

final declaratory judgment and decree of permanent injunction granted in a civil suit in which the United States was Plaintiff and which was heard and determined by a Federal District Court of three judges and in which the Montana Contractor's Gross Receipts Tax (Chapter 35, Title 84, Revised Codes of Montana) was declared unconstitutional and enforcement of the Act was enjoined. Taxes collected under the Act since mid-1971 were ordered repaid. The action was commenced below by the United States pursuant to Title 28, Sections 1345, 2201, 2281 and 2284.

The judgment below was dated October 17, 1977, and was filed and entered on October 18, 1977, in the United States District Court for the District of Montana, Helena Division, in Civil Action No. 1989. No order was made respecting any rehearing. Timely Notice of Appeal, dated December 15, 1977, was filed in the foregoing District Court on December 15, 1977.

The statutory provisions believed to confer jurisdiction of this appeal on this Court are Title 28, U.S.C., Sections 1253, 2281 and 2284. Probable jurisdiction was noted in this case on May 22, 1978.

Statute Involved

The validity of Montana's Contractors' Gross Receipts Tax (the Act) is involved in that the judgment below held that the Act, Chapter 35, Title 84, officially published in Volume 5, Part 2 of the Revised Codes of Montana, as amended, is in violation of the Supremacy Clause, Article VI, Clause 2, of the United States Constitution and is, therefore,

unconstitutional and void as to the United States of America, its contractors, subcontractors and those with whom it deals. The text of Chapter 35 is lengthy and is set forth verbatim, J.S. App. 38, *et seq.*

Nature of the Montana Act Which was Declared Unconstitutional

The Montana Act levies an initial 1% tax upon the gross receipts of "public contractors" defined to include all persons who perform contracts for the State of Montana, its subdivisions (e.g., counties, municipalities, school districts, special improvement districts etc.) and the United States Government. No gross receipts tax is levied under the Act upon "private contractors" — those who perform construction contracts for private citizens. The Act contains provisions for refunds and credits: public contractors who produce proof of payment of Montana personal property taxes receive dollar-for-dollar refunds of such taxes from the gross receipts taxes paid; the balance of the gross receipt tax may be claimed as a credit against Montana's personal income and corporate license taxes. By virtue of such credits the effective rate of the 1% gross receipts tax is reduced to approximately one half of one percent. The tax is levied on the contractor, not on any governmental unit. The Federal government has nothing to do with collecting, withholding or remitting the tax.

Constitutionality of Montana Act was Twice Construed by the Montana Supreme Court During Period When Federal Court Action in this Case was Stayed for that Purpose

On April 2, 1971, Peter Kiewit Sons' Co. filed a suit in Lewis and Clark County, Montana challenging the constitutionality of the Act here in question. This state case proceeded through the Montana trial and appellate courts and is reported as *Kiewit Sons' -vs- St. Bd. of Equalization*, 161 Mont. 140, 505 P.2d 102 (1973), and can be conveniently referred to here as "Kiewit #1". It appears in the J.S. App., commencing page 105.

On April 12, 1971, the United States filed a federal court complaint identical to the state court *Kiewit #1* litigation in the Federal District Court of Montana, Cause No. 1989, Helena Division. A three judge Court was impaneled. On May 10, 1971, Montana filed its answer; and on May 24, 1971, the parties stipulated (J.S. App. 49) and the court made an order continuing the federal case without date "pending the resolution in the state courts or appeals therefrom of the (Kiewit #1) case." (J.S. App. 50)

During the federal stay period, described above, the Montana Supreme Court also decided *Kiewit #2*, 166 Mont. 260, 531 P.2d 1327 (1975), holding that *Kiewit #1* was *res judicata* as to the constitutional challenges to the Act and additionally finding that the Act is a valid revenue raising measure.

The United States controlled the state court *Kiewit* litigation. It directed the filing of the cases; paid the costs of litigation; was the real party in interest; directed the appeals to the Montana Supreme Court and to the United States Supreme Court. Notice of Appeal to the Supreme Court of the United States was filed in *Kiewit #1* pursuant to 28 U.S.C., 1257 (2), but was abandoned by Kiewit in

August, 1973 at the direction of the U. S. Solicitor General, Erwin N. Griswold. (See Agreed Fact 12, J.S. App. 86)

After the state court litigation was concluded and the U. S. Supreme Court appeal was dismissed, Montana moved for Summary Judgment (J.S. App. 63) in the federal litigation under the rules of *England -vs- Medical Examiners*, 375 U.S. 411 and *Drummond -vs- U.S.*, 324 U.S. 316 on grounds that the United States controlled the state court litigation and had elected to fully litigate the case in the state courts and could not now return to the federal court to relitigate its claims. Also, the doctrines of *res adjudicata* and collateral estoppel were specified in support of such Motion. On November 8, 1974, the Federal District Court denied the motion (J.S. App. 65-75), and the constitutional issues were again presented by the United States to the Federal Court resulting in the declaration of unconstitutionality and the injunction recited under "Jurisdiction", above.

Questions Presented

1. Whether a one-half of one percent state gross receipts tax on contractors performing construction contracts for the State (and subdivisions) and Federal Governments violated the Supremacy Clause and the rule of *Phillips Chemical Co. -vs- Dumas School District*, 361 U.S. 376 (1960) because the revenue from the tax is a benefit to the State but not to the Federal Government.

2. Would not an interpretation of the *Phillips* rule outlawing the Montana Act under "1" next above render *any* state tax on contractors or suppliers for

both state and federal governments void and "overrule", sub silentio, prior landmark decisions?[1]

3. Under the rule in *United States -vs- County of Fresno*, 429 U.S. 452 (1977) requiring that the state tax be imposed equally on the federal contractors and also on other similarly situated constituents in Montana, did not the contractors performing public contracts for the Montana cities, school districts, special improvement and irrigation districts, etc., constitute such a class; and was not the treatment of these non-federal constituents precisely like that of contractors working for the federal government so as to render the tax non-discriminatory?

4. Where the inherent nature of the Act requires classification of private citizens into taxpayers and non-taxpayers, did not the lower court err in eschewing any consideration of equal protection standards in testing for discrimination — even though it went on to find violation of the Equal Protection Clause?

5. Was it not error for the lower court to equate the Federal Government to the status of a taxpayer and test the classification of taxpayer and non-taxpayer under Supremacy standards; and would not such a Supremacy test invariably render state taxes void even when they clearly meet Equal Protection standards?

6. In this taxation field involving questions of "inter-governmental tax immunity" (*Phillips Chemical* at 361 U.S. 385) heavily involving present and future tax programs of the several states, should

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[1] *James -vs- Dravo Contracting*, 320 U.S. 134 (1937); *Silas Mason Co. -vs- Tax Comm. of Washington*, 320 U.S. 186 (1937); *Alabama -vs- King & Boozer*, 314 U.S. 1 (1941); *U.S. -vs- Detroit*, 355 U.S. 466 (1958).

not the United States Supreme Court clearly define the scope of the requirement (*James -vs- Dravo*, Question 2, supra) that the state tax be "non-discriminatory"? Is the test for possible discrimination made under the Supremacy Clause (*Phillips Chemical* rule) or under the Equal Protection Clause of the Fourteenth Amendment (*Allied Stores -vs- Bowers*, 358 U.S. 522 (1959) *or both?* (See question as posed in *Homestake-Sapin Partners -vs- U.S.*, 375 F.2d 507, 512 (1967))

7. After electing the risks as specified in *England -vs- Louisiana Medical Examiners*, 375 U.S. 411, of participating in and controlling state litigation which was conducted during stipulated abstention of federal litigation, can the Federal Government, when defeated at all state levels, return to the federal forum and relitigate the issues decided in the state court?

8. Are not the real parties in interest barred by the doctrines of *res judicata* and collateral estoppel from relitigating in the Federal Court issues resolved in state court litigation conducted during Federal Court abstention?

STATEMENT OF THE CASE

a) *Kiewit Decisions*

During the period of the Federal abstention, the Montana Supreme Court handed down opinions in both *Kiewit* #1 and #2 and decided:

a) There was a valid distinction for tax purposes between public contractors and private contractors, and the Act was not unconstitutionally discriminatory when gauged by Four-

teenth Amendment, Equal Protection standards.

b) The Act did not unconstitutionally discriminate against the Federal Government under the Supremacy Clause (Art. VI, clause 2, U.S. Constitution) because those contractors who dealt with the State were treated no better than contractors dealing with the Federal Government as required by the *Phillips Chemical* rule.

c) The economic impact of the tax on the Government was not direct nor substantial and since it also was not discriminatory under either Equal Protection rules or Supremacy rules, it met all requirements of *James -vs- Dravo*, 302 U.S. 134.

Kiewit #2 added the ruling that the Act was a valid revenue producing measure.

In November, 1974, after both *Kiewit* decisions the Federal Court denied Montana's motions for Summary Judgment, (J.S. App. 65). Thereafter the case was delayed getting on to trial because the Government desired to conduct an elaborate survey of the impact on in-state contractors -vs- out-of-state contractors of the Act's personal property and income tax credits. The Government hoped to show some discrimination against out-of-state contractors as suggested by the lower court in denying the State's motion for Summary Judgment (J.S. App. 73) and thereby broaden its challenges to the Act beyond what the State courts had decided and so avoid the impact of the *England* and collateral estoppel rules. However, the survey showed that in-state contractors pay an effective tax after credits

and refunds of .44% and out-of-state contractors working in the state pay .46%. In its final judgment the lower Court found the difference "de minimis" and the Government's contention of discrimination against out-of-state contractors to be without merit. (J.S. App. 17).

Immediately prior to trial in the federal court the Government agreed, after some four years of litigation, that the case of *Miller v. Arkansas*, 352 U.S. 187 was applicable and the regulatory provisions of the Act *do not apply* to the United States. (J.S. App. 78). A pre-trial order was prepared by the parties and approved by the trial judge. (J.S. App. 80-104).

b) *Federal Trial*

The case went to trial commencing March 30, 1976 before one of the three-judge panel — Hon. Russell E. Smith. The Government's contentions were: (J.S. App. 92)

1. That the Act discriminates against the United States in violation of the Supremacy Clause in that:
   a) The Federal Government bears the entire burden of the tax.
   b) The Act forces the U.S. to pay more for its construction than does the State of Montana.
   c) The Act forces the Federal Government to pay more for its construction than does a private party.
2. The "legal incidence" of the tax falls on the United States. (rejected below)

3. The Act discriminates against out-of-state contractors. (rejected below)

The State's contentions were: (App. 94)

1. The Act treats federal contractors exactly the same as it treats state contractors and thereby complies with the *Phillips Chemical* rule (361 U.S. 376); does not violate the Supremacy Clause, and is non-discriminatory.

2. There is a valid distinction for tax purposes between public contractors as a class and the class of contractors who perform work for private individuals; and hence, there is no discrimination under the Equal Protection Clause of the 14th Amendment.

3. No tax is laid directly on the U.S.; and the economic impact of the one half of one percent tax on the Government is neither direct nor substantial and therefore complies with the rule of *James -vs- Dravo.* (302 U.S. 134)

4. As the real party in interest in control of the state court litigation, the Federal Government is barred by the doctrines of *England -vs- Medical Examiners,* 375 U.S. 411 and *Drummond -vs- U.S.,* 324 U.S. 316 from returning to the Federal forum and relitigating the case.

5. The Government's contentions that the Act discriminates against the U.S. by violating the Supremacy Clause and/or the Equal Protection Clause were each specifically passed upon by the Montana Supreme Court thereby barring re-litigation of such issues under the doctrine of collateral estoppel.

c) *Lower Court's Majority Decision*
(J.S. App. 5-19)

The majority of the lower court held:

1. There was Supremacy Clause discrimination against the Government because the revenues generated from the Act must be subtracted from the cost of otherwise matching, hypothetical State and Federal projects. Since the revenues of the State Act went to the State and not to the Federal Government, the State is treating itself better than the Government, thereby violating the Supremacy Clause. (J.S. App. 11-13) (The lower court recognized J.S. App. 12 para. 5) but held insignificant the fact that even under its foregoing comparison of costs at the sovereign level (rather than comparison of taxes at the contractor's level), all State subdivisions (cities, counties etc.) were treated exactly the same as the Federal Government since the tax went to the State and not to municipalities, school districts, SID's etc.)

2. While saying that it need not reach the question of discrimination under the Equal Protection Clause, between the classes of contractors taxed and not taxed, the majority nevertheless found under unspecified standards that there was no distinction between public and private contractors and hence there was unlawful discrimination against Government contractors because of the tax on them. (J.S. App. 15-17)

3. Neither the *England* nor collateral estoppel doctrines were applicable. (J.S. App. 12-13)

4. In-state and out-of-state contractors are treated substantially identically and hence no constitutional violation at that level. (J.S. App. 17-18)

d) *Dissent Of Chief Circuit Judge Kilkenny*
(J.S. App. 20-35)

Judge Kilkenny vigorously dissented and noted:

1. Because of the Government's control of the state court litigation, it was bound by the state court results and could not return to the Federal forum and re-litigate. (*England rule*) (J.S. App. 25-26)
2. Collateral estoppel applies and forecloses reconsideration of the key supremacy and equal protection issues. (J.S. App. 23-27)
3. If the majority's Supremacy Clause requirement to deduct the tax from the cost of State construction were valid it would outlaw or "overrule", sub-silentio, the line of cases represented by *Dravo.* (J.S. App. 28) The proper test for Supremacy discrimination is at the level of the contractors who work either for the U.S. or for a division of State Government; and since the Act "treats those who deal with the (federal) Government as well as it treats those with whom it deals", there is no Supremacy Clause violation. (J.S. App. 30-31)
4. The Act doesn't violate Equal Protection standards. The classification between public and private contractors is valid. (J.S. App. 31-33)
5. The legal incidence of the tax is not on the Federal Government. (J.S. App. 34)

SUMMARY OF ARGUMENT

SECTION I

The lower court obliquely found that the Act was unconstitutional under Equal Protection standards of the Fourteenth Amendment as being discriminatory against those who deal with the Government. But in coming to that conclusion, the lower court majority cited *U.S. -vs- County of Fresno,* 429 U.S. 452 (1977), which turns not on equal protection "discrimination" but rather Supremacy Clause "discrimination"; and further, in finding such equal protection discrimination, the lower court failed to cite or apply any of the well-established standards set forth in *Madden -vs- Kentucky,* 309 U.S. 83 (1939) and *Allied Stores -vs- Bowers,* 358 U.S. 522 (1959). Quite apparently the lower court was confused as to the full scope of the "discrimination" question and erred in the application or exclusion of the leading authorities in the field. Consequently, the Argument commences (Sec. I, page 18) with an analysis of "discrimination" under Fourteenth Amendment concepts and notes that such discrimination is separate and apart from the basic rule of *M'Culloch -vs- Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

In the four subdivisions of Section I of the Argument the equal protection tax classification rules as set forth in *Madden -vs- Kentucky,* 309 U.S. 83 are reviewed. From such a study it is apparent that the legislative powers of tax classification are very broad; are presumed to be correct; that a taxpayer (here the Government) seeking to upset such classification on constitutional grounds have a very heavy burden and must rule out every conceivable justification for the classification made by the Legislature.

In Section Ic (p. 21) it is established that the lower court neither cited *Madden* nor applied equal protection rules pertinent to classification. Much later in the brief (Sec. II-g, page 36) after an analysis of the Supremacy Clause discrimination rule as specified in *U.S. -vs- County of Fresno,* 429 U.S. 452 (1977) has been made, the error the lower court in citing *Fresno* as justification for its conclusion that the Act violates equal protection rules is made.

In Section I-d (page 22) the Appellant argues that the lower court was wholly failed to properly analyze the Act as to the tax classification between public and private contractors under established (*Madden* and *Allied Stores*) rules and has erred to the prejudice of Montana and the confusion of the States.

SECTION II

In Section II of the brief the history of the *M'Culloch -vs- Maryland* rule is traced from its inception in 1819 up through *James -vs- Dravo,* 320 U.S. 134 (1937) and *Alabama -vs- King & Boozer,* 314 U.S. 1 (1941).

For the first century *M'Culloch* was given a strict construction such that a state tax with only indirect economic impact on the Federal Government was unconstitutional. (*Weston -vs- Charleston,* 27 U.S. (2 Pet.) 449 (1829) but with the burgeoning of federal and state functions the impracticality of such an application of *M'Culloch* was apparent. Thus, in *Gillespie -vs- Oklahoma,* 257 U.S. 501 (1922) a state income tax on oil and gas recovered by a private lessee of Indian lands was held unconstitutional; and in *Panhandle Oil -vs- Mississippi,* 277 U.S. 218 (1928) a state

sales tax on a distributor of petroleum products selling to the Government was held unconstitutional.

In Section II-b (page 24) of the Argument the new trend of the Court away from *Panhandle et al* is traced and the holding of *James -vs- Dravo,* 320 U.S. 134 (1937) is noted wherein the necessity of a practical application of *M'Culloch* was adopted and a rule announced that a state tax on a private individual which had indirect and inconsequential (2% gross receipts tax) economic impact on the United States was not void under *M'Culloch.* In the same section it is noted that the *King & Boozer* case, supra, overruled *Panhandle Oil.*

Congress, which of course, has the power to legislate in this field, has approved of the Court's swing to a practical application of *M'Culloch* as set forth in *United States -vs- Boyd,* 378 U.S. 39 (1964). This case is cited in Section II-c (page 27) of the Argument.

In Section II-d, (page 29) it is pointed out that under the new trend in *M'Culloch* as represented by *Dravo et al,* the state tax must be "non-discriminatory". Discrimination wasn't a problem under *M'Culloch* prior to *Dravo* because of the total voiding effect of any state tax impact on federal function.

In Section II-d it is pointed out that "discrimination" under the Supremacy Clause is different from "discrimination" under the equal protection clause. The Supreme Court has applied the Supremacy Clause discrimination concept in two cases: *Phillips Chemical Co. -vs- Dumas School District,* 361 U.S. 376 (1960) and *U.S. -vs- County of Fresno,* 429 U.S. 452 (1977).

In Section II-e (page 32) the application of Supremacy Clause discrimination under *Phillips Chemi-*

cal is studied and the rule of the case noted to be that a state must treat those who deal with the Federal Government at least as well as it treats those who deal with the state. The lower court's egregious error in misinterpretation and mis-application of the *Phillips Chemical* rule is then noted. The lower court found discrimination (apparently under *Phillips*) by subtracting the net state tax from the cost of hypothetically-matching state and federal projects. The resulting cost imbalance (since the tax of course went to state and not federal coffers) was cited by the lower court as proof of discrimination against the Government. Such a holding shows a misconception of *Phillips* and also *Dravo* since *Dravo* recognizes that a state tax can have economic impact on the Government. If such a test for Supremacy Clause discrimination were allowed to stand, a host of Supreme Court decisions (*Dravo, King & Boozer* etc.) would be clouded. It is this portion of the lower court judgment which has brought the host of Amici Curiae into this litigation.

In Section II-g (page 36) appellants analyze the court's holding in *Fresno* and note the requirement that the state tax must affect others similarly situated in the same manner as it affects those dealing with the Federal Government. Under the California tax the "others similarly situated" are renters of homes in the private sector, and the Supreme Court found sufficient like treatment under California law in that while no tax was directly laid on such private renter, the tax on his landlord was presumably passed down to him in the form of augmented rent. Under the Montana Act the parallel treatment of the federal contractor and "others similarly situated" is precisely met in that the same identical tax and rate

is levied both on contractors doing business with the Federal Government and those doing business with the state *and with every non-state public entity in Montana* such as school districts, cities, special improvement districts, irrigation and flood districts etc.; and further, that as to watchdog duties of such similarly situated taxpayers in guarding against legislative abuse of tax rates to the embarassment of the Federal Government, the Montana entities could reasonably be relied upon to be at least as alert as their California counterparts since the tax is identified (not included in rent) and private citizen members of school boards etc. are the most cost and tax conscious and civically vocal of any groups in our society.

In Section II-h, (page 38) of the Argument it is pointed out that the lower court majority cited *Fresno* as authority that the Montana Act was "discriminatory" under equal protection concepts. Such a holding is erroneous and greatly muddies the water for the states as to the scope of "discrimination" in this area of intersovereign taxation.

In Section III of the Argument the appellants analyze the lower court majority's error in not sustaining the state's motion for Summary Judgment under *England* after the Government had taken all of the constitutional issues to the Montana state courts in *Kiewit #1 and #2* and, after adverse determinations there, had sought to return and relitigate them in the Federal Court. In Section III (page 42) the lower court's error is not recognizing the applicability of collateral estoppel rules as to litigated issues in the state courts is related.

The Conclusion of the Appellants is set forth commencing at page 49.

ARGUMENT

I.

THE ACT IS NOT DISCRIMINATORY UNDER EQUAL PROTECTION STANDARDS

The lower court obliquely found that the Act was discriminatory under the Equal Protection Clause of the Fourteenth Amendment and specifically found that it violated the Supremacy Clause. In each such finding the court erred.

a) *Brief Consideration of Equal Protection Rules is Necessary*

Since the lower court only left-handedly condemned the Act as violating the Equal Protection Clause of the Fourteenth Amendment, the discussion of alleged discrimination under that clause will be kept brief; however, the subject matter must be treated, for the Government in its attack on the Act has played the "discrimination" field to its fullest. (J.S. App. 93) Also in the Montana Supreme Court in *Kiewit #1*, equal protection "discrimination" was the Government's principal argument (161 Mont. 140, 146; 505 P.2d 102, 106; J.S. App. 114), even though now it appears that only Supremacy Clause "discrimination" is relied upon. (Main Appendix 5 hereinafter "M.A.")

Just what "discrimination" means and how it is gauged in this category of litigation isn't at present entirely clear to bench and bar. *Homestake-Sapin Partners -vs- United States*, 375 F.2d 507, 512 (1967). Whenever there is a state tax which has potential economic impact on the Government, a supremacy issue is raised and *M'Culloch -vs- Maryland*, 17 U.S. (4 Wheat.) 316 (1819) becomes relevant.

But *M'Culloch* did not involve, as here, the basic question of a tax directly on private citizens and with only indirect and insubstantial economic impact on the United States (as in *Dravo*). *M'Culloch* involved an attempt by Maryland to directly tax the Maryland branch of the Bank of the United States recently created and incorporated by Act of Congress. There was no discussion in the decision of "discrimination." There could be none because the holding of the case was that Maryland was absolutely powerless to directly tax the United States Bank. There could be no question of mechanics of the tax; it was totally and fundamentally void. Subsequently herein, the application over the intervening century of *M'Culloch* principles to taxing situations directly involving private taxpayers and only indirectly involving the Government by remote economic impact (*Dravo*) will be discussed, and it will be seen that, then, for the first time, the requirement of "non-discrimination" comes into the decisions. But historically, in tax parlance, "discrimination" pertains to tax classification and Fourteenth Amendment equal protection rights and not to the Supremacy Clause enunciated in *M'Culloch*. *Madden -vs- Kentucky*, 309 U.S. 83 (1939); *Charleston Fed. Sav. & L. Assn. -vs- Alderson*, 324 U.S. 182 (1944); 71 Am.Jur.(2d) 491, 495, Sections 172, 173, *et seq.*

b) *Legislative Powers of Tax Classification are Broad*

In the *Madden* case, supra, the following rules applicable to tax classification were enunciated:

1. State legislatures have broad discretion as to classification for tax purposes.

2. The Fourteenth Amendment was not intended to compel a state to adopt an iron rule of equal taxation.
3. In taxation, more than in other fields, legislatures possess the greatest freedom in classification.
4. Classification by a legislature is presumed to be constitutional.
5. A court will not declare a classification void under the equal protection clause except upon the most explicit demonstration that the classification is a hostile and oppressive discrimination against particular persons and classes.
6. The burden is on the one attacking classification to negative every conceivable basis which might support it.

The Montana Supreme Court reviewed the evidence adduced in the state court trial of *Kiewit #1* and found that the classification between public contractors who paid the tax and private contractors who paid no tax was valid.

> "We believe that a distinction between public and private contractors is not arbitrary or capricious and following the reasoning of the United States Supreme Court — the State of Montana has the power to make such a distinction and the statute in question is not unconstitutional."
>
> *Kiewit -vs- State Board*, 161 Mont. 140, 151, 505 P.2d 102, 109, J.S. App. 119

See also *Brown-Forman Co. -vs- Kentucky*, 217 U.S. 563 (1910), relied upon by the Montana Court;

Allied Stores of Ohio -vs- Bowers, 358 U.S. 522 (1959).

At the trial in the federal court, testimony was also adduced showing real and substantial differences between public contracts and private contracts. (M.A. 177, *et seq.*)

c) *Lower Court Finds Equal Protection Violation Without Applying Madden-type Standards*

Discrimination under equal protection standards must be tested at the true taxpayer level. The Government in its contentions at the trial below claimed that the tax "discriminated against those with whom the Government does business" (J.S. App. 8) — i.e., public contractors. The lower court obliquely agreed without citing any authorities, without reviewing *Madden* rules and without in any wise requiring or making "the most explicit demonstration" of oppressive and hostile discrimination as demanded by *Madden*.

> "It is manifest to us that as between Contractors and large structure private contractors, there is no reasonable or rational factual basis for the demonstrated unequal treatment under the Act."
>
> J.S. App. 16

If the Lower Court was determined to make an evaluation of the tax classification under the Equal Protection Clause or at least be inferentially critical of the constitutionality of the Act as it so expressed itself, then the evidence and the law should have been properly reviewed. Had this been done, it is respectfully submitted that the classification would have been upheld! The dissent of Judge Kilkenny (J.S. App. 33) was explicit in noting the Govern-

ment's burden of proof and the Court's required standard of review, Judge Kilkenny would have upheld the classification:

> "*Kiewit #1* held that a valid tax classification lay between public and private contractors and I do not think that the federal government has shown otherwise. I find no evidence in the record to show that the government met its burden of proof. Testimony offered by the State of Montana, on the other hand, attests to the real and substantial differences between the two classes of contractors. For equal protection purposes, there is a very liberal standard of review and cases will be upheld if there is any conceivable basis which will support the classification. (citations) . . . In short, I think that the federal government has failed in its burden of showing the classification improper. In view of the standard of review, I would uphold the classification."
>
> Kilkenny Dissent (J.S. App. 33)

d) *Conclusion: The Court Erred In Finding Equal Protection Violation*

It was proved at trial that there is a real and substantial difference between public and private contractors. Such classification as made by the Legislature and ratified by the Montana Supreme Court is presumed sound. By no means did the Government prove that there is no conceivable basis for such classification. Since the classification is valid, the public contractor doing business with the Federal Government is not discriminated against and the Lower Court erred in so finding.

II.

THE LOWER COURT ERRED IN FINDING SUPREMACY CLAUSE DISCRIMINATION

a) *Period of Strict Construction of M'Culloch*

From the period of the *M'Culloch* decision in 1819 into the 1930's, the court strictly construed *M'Culloch*, and the rule was that any state tax which directly or indirectly could "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General government" was void.

Weston -vs- Charleston, 27 U.S. (2 Pet.) 449 (1829)

With the increasing activities of both federal and state governments, the states found themselves more and more in potential conflict with such a rule. In *Gillespie -vs- Oklahoma*, 257 U.S. 501 (1922), Oklahoma was forbidden under *M'Culloch* from levying a state income tax on the oil and gas income of a private individual in Oklahoma who had leased Indian lands and produced and sold oil and gas therefrom. Since the lands belonged to the Indians as wards of the Government, the tax was held to be an impediment to the Government's obtaining the best possible terms for the Indians from private lessees of such lands and thereby frustrated its federal function.

And in *Panhandle Oil Co. -vs- State of Mississippi*, 277 U.S. 218 (1928), a state sales tax on private gasoline distributors of three to four cents per gallon was held void as to gasoline sold by a private distrib-

utor to the United States for use in Coast Guard vessels and a federal veterans hospital.

> "The United States is empowered by the Constitution to maintain and operate the fleet and hospital. (Art. 1, Sec. 8.) That authorization and laws enacted pursuant thereto are supreme (Article 6); and in case of conflict, they control state enactments."

See also *Graves -vs- Texas Co.,* 298 U.S. 393 (1936).

This period of the 1930's and early 1940's witnessed burgeoning federal projects and heavy construction works of the nature of federal dams and war-related federal projects in the United States. On the one hand, such huge projects (e.g., Grand Coulee dam) brought potentially great fees and sales income to local contractors and suppliers. On the other hand, the pressure on the states for vastly augmented housing, schooling, police protection, fire protection, etc., for construction crews and their families was enormous. How could the states perform their functions if the income of the private contractors was exempt under *Gillespie* and the sales of materials for use in government projects was tax exempt under *Panhandle?* In a comparison of impacts on the dual system of state and federal governments, how could the slight impediment to federal function by indirect economic impact of state taxes on federal construction fairly be said to outweigh the badly needed revenues precluded to the states?

b) *Court Adopts Practical Application of M'Culloch Recognizing Need for States' Co-Existence*

The rules of cases such as *Gillespie* and *Panhandle Oil* were not required by the *M'Culloch* holding.

> "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of similar power to the government of the Union; that it is to be *concurrently exercised by the two governments* are truths which have never been denied." (Emphasis supplied).
>
> *M'Culloch -vs- Maryland,*
> 17 U.S. (4 Wheat.) 316, 425

> "It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be paid. The States are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence, the federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States or prevent their efficient exercise."
>
> McReynolds dissent in *Panhandle,* 277 U.S. 218, 225, 226

In 1937, the Court decided *James -vs- Dravo Contracting Co.,* 302 U.S. 134 and its companion case of *Silas Mason -vs- Tax Comm. of Washington,* 302 U.S. 186. In 1941, in *Alabama -vs- King & Boozer,* 314 U.S. 1, the Court specifically overruled *Panhandle.*

Dravo involved a West Virginia contractors' gross receipts tax of 2%, which was challenged by a contractor performing construction work for the Government as impeding performance of a federal function. The Court held that since the tax was on the contractor with only indirect and inconsequential economic impact on the Government, the tax was not outlawed by *M'Culloch.*

King & Boozer involved a 2% sales tax imposed by Alabama on materials furnished by King and Boozer as materialmen to the cost-plus contractors doing work for the Federal Government. Under *Panhandle,* supra, the tax would have been void; however, the Court specifically overruled it and upheld the tax.

In 1942 in *Penn Dairies -vs- Milk Control Comm.,* 318 U.S. 261, 270, the Court noted as to its recent decisions:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental function performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders. (citations) And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system. (citation)

See also *Oklahoma Tax Commission -vs- Texas Co.,* 336 U.S. 342, 352 (1949).

c) *Congress Approves Court Shift*

The Court has always recognized that Congress could specifically legislate in the field being discussed.

> "Congress has declined to pass legislation immunizing from state taxation contractors under 'cost-plus' contracts for the construction of governmental projects. Consequently the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, and we are not now concerned with the extent and appropriate exercise of the power of Congress to free such transactions from state taxation of individuals in such circumstances that the economic burden of the tax is passed on to the national government."
>
> *Alabama -vs- King & Boozer,* 314 U.S. 1, 8 (1941)

Since *King & Boozer,* the Congress has specifically acted to indicate its approval of state taxation in this field. In *United States -vs- Boyd,* 378 U.S. 39 (1964), Tennessee levied and collected a tax on a contractor's right to use tangible personal property owned by the United States (Atomic Energy Commission) and situated at Oak Ridge, Tennessee. The tax was enacted by Tennessee after Congress in 1953 repealed the statutory immunity from taxation of contractors performing work for the AEC. The

Court noted the knowledge of Congress in the field and its desire to permit the states to tax private individuals performing even cost-plus contracts for the Federal Government:

> "It is undoubtedly true, as the Government points out, that subjection of government property used by AEC contractors to state use taxes will result in a substantial future tax liability. But this result was brought to the attention of Congress in the debates on the repeal of Section 9(b), which exempted the activities of AEC contractors from state taxation; indeed the AEC argued that the repeal would substantially increase the cost of the atomic energy program by subjecting AEC contractors to state 'sales and use taxes' and 'business and occupation' taxes. Nonetheless, Congress, well aware of the principle that 'constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly on the United States,' S.Rep. No. 694, 83d. Cong., 1st Sess., 2, repealed the statutory exemption for the declared purpose of placing AEC contractors in the same position as all other government contractors. Act of August 13, 1953, c. 432, 67 Stat. 575. The principles laid down in King & Boozer, Curry, Esso, and Muskegon, we think, strike a proper judicial accommodation between the interests of the states' power to tax and the concerns of the Nation, they are workable, and we adhere to them. If they unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its proper powers, not this Court, to make the desirable adjustment.
>
> *United States -vs- Boyd*, 49, 50, 51

See also *United States -vs- Detroit*, 355 U.S. 466, 474 (1958).

d) *Requirement That the State Tax Be "Non-Discriminatory"*

From the inception of the modern rule under *Dravo* and *King & Boozer*, the Court has always specified that although a tax does not violate the *M'Culloch* sovereignty rule if it imposes some indirect, insubstantial economic impact on the Government, such tax must be "non-discriminatory."

> "It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the government or those with whom it deals."
>
> *United States -vs- Detroit*, 355 U.S. 466, 473 (1958)

See also: *James -vs- Dravo Contracting Co.*, 302 U.S. 134, 149 (1937); *Detroit -vs- Murray Corp.*, 355 U.S. 489 (1958); *United States -vs- County of Fresno*, 429 U.S. 452, 460 (1977).

d-i) *Meaning of "Discrimination" Under the Supremacy Clause*

Under Section I of this brief, page 18, *et seq.*, the law pertinent to "discrimination" in the Equal Protection field was discussed and the error of the lower court majority in not sustaining the tax as non-discriminatory was noted.

In this Section II of the brief, the validity of the Act under a Supremacy Clause challenge is being studied. Since the law pertinent to Supremacy cases also requires "non-discrimination" as a condition of

constitutionality, the natural inquiry of bench and bar is whether "discrimination" for Supremacy purposes is the same as "discrimination" for Equal Protection purposes.

> "Whether a tax discriminatory against the United States is unconstitutional under the Fourteenth Amendment, the supremacy clause, or both, is a question the Supreme Court has not had an occasion to answer."
>
> *Homestake-Sapin Partners -vs- United States,* (CA 10, 1967), 375 F.2d 507, 512

Appellant, State of Montana, respectfully submits that there are two constitutional requirements for the validity of a state tax of the nature here involved: valid classification (non-discrimination) under equal protection standards as measured by *Madden* rules; and that the tax be "non-discriminatory" under Supremacy Clause rules as enunciated in *Phillips Chemical Co. -vs- Dumas School District,* 361 U.S. 376 (1960) and *United States -vs- County of Fresno,* 429 U.S. 452 (1977). So Montana's proposed response to the *Homestake* inquiry is "both."

d-ii) *The Phillips Chemical Discrimination Rule*

Neither *Dravo* nor any of the subsequent cases in the field up to *Phillips Chemical Co. -vs- Dumas School District,* 361 U.S. 376, defines supremacy clause "discrimination." When the Montana Supreme Court decided *Kiewit #1* in 1973, the *Fresno County* case had not been decided.

The non-discrimination rule of *Phillips* is that a state must treat those who deal with the Federal

Government at least as well as it treats those who deal with the state.

> "Accordingly, it does not seem too much to require that the State treat those who deal with the (federal) government as well as it treats those with whom it deals itself."
>
> 361 U.S. 385

In *Phillips Chemical,* Texas imposed a tax on lessees of federal real property but not on lessees of state real property, and so the tax discriminated against the United States and was void under the Supremacy Clause.

The Montana Supreme Court in *Kiewit #1* adopted the *Phillips*[2] definition of discrimination and found that the Act in question treats those who deal with the Federal Government precisely as it treats those contractors who do work for the state:

> "(9) Here, we do not believe that the state of Montana has discriminated against the federal government. The federal government is being treated in the same manner as the state of Montana treats itself and its subdivisions or municipalities. The only discrimination the federal government can claim is that private contractors are not paying the same tax as public contractors. However, according to case law, all the United States Supreme Court has required is that the state does not give itself special treatment over that received by the federal government. The Act involved here treats the federal government in the same manner as it treats those who deal with any

---

[2]And *Moses Lake -vs- Grant County,* 365 U.S. 744 (1961).

part of the state government. The second half of the discrimination question is denied."

J.S. App. 121

Since the Act levies an identical gross receipts tax on those contractors who perform work for the state or for the Federal Government or for any of the myriad school district, counties and all other public bodies in Montana, the conclusion of the Montana Supreme Court appears fully justified; however, the federal court below erroneously found otherwise.

e) *Lower Federal Court Misconstrues and Misapplies Phillips Discrimination Rule*

The lower court majority in this case misread and misapplied the *Phillips Chemical* holding. For a test of Supremacy Clause discrimination, the lower court assumed hypothetically-matching state and federal projects. As to the state project, it then deducted the net state tax; and since the tax produced revenue for the state and not for the Government, there was no comparable deduction available to the hypothetical government project; so there was "discrimination" against the government.

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G. R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G. R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G. R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G. R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G. R. Tax and gets no return of the overplus of approximately 50 percent."
>
> (J.S. App. 13)

But, as the dissent indicates, the affirmance of such a holding would overrule a long line of cases represented by *Dravo, King & Boozer* (and others cited below):

> "The reasoning of the majority *sub silentio* overrules this and other authority. In each of the above cases, the tax would apply equally to those doing work for the state government. Applying the reasoning of the majority, there is discrimination against the federal government because the otherwise legitimately-collected tax (general state revenue) reduces the state's net cost, thereby allowing it to spend less than the federal government. Thus, under the guise of discrimination against the federal government, any state tax could be traced backwards to defeat its own existence."
>
> (J.S. App. 28-29)

In each of the following intergovernmental tax cases revenues from a state tax went to the state and not the federal government thereby "discriminating" against the Government if it is proper in testing for Supremacy Clause discrimination to compare hypothetical state and federal projects and deduct the tax from the cost of the former.

> *James -vs- Dravo Contracting Co.*, 302 U.S. 134 (1937)
>
> (2% gross tax on construction contractors — including those working for federal government.)

Alabama -vs- King & Boozer, 314 U.S. 1 (1941)
(2% sales tax on private gas distributor to either federal or state facilities with a cost-plus contract for federal government.)

Silas Mason Co. -vs- Tax Comm. of Washington, 302 U.S. 186 (1937)
(2% tax on gross income of construction contractors — state or federal.)

United States -vs- Boyd, 378 U.S. 39 (1964)
(State use tax on property owned by state or federal governments but used by independent contractors in their performance of state or federal contracts.)

Phillips Chemical did not require any such cost comparison test for Supremacy Clause discrimination as made here by the Lower Court, nor does the lower majority cite any case that does.

Furthermore, in arriving at its "rule," the lower court wholly ignores all of the non-federal, non-state, public construction entities in Montana. As to all such construction, there is no way, hypothetically or otherwise, that the net revenue from the state tax can be set off against construction costs so as to create an imbalance vis a-vis the Federal Government. Every city, school district, etc., project costs EXACTLY the same as a matching hypothetical federal project!

Next, the lower court holding ignores the uncontested facts that departments of the state itself which embark on construction projects have to budget for allotted construction money; they must construct within the budget, they must depreciate and insure the property for what it truly cost the particular department and have no possible way of allocating general tax funds derived from the tax back to

the cost of a project to factually or hypothetically change any of the foregoing. (M.A. 185). There is no amorphous pot of state funds into which departments of the state can dip to reduce costs.

And finally, the Lower Court's use of hypothetically-matching state and federal projects and a comparison of "costs" pertinent thereto is no more affected by a hypothetical reduction of state construction costs by "feedback" of the tax revenues of the Act itself than the cost of the federal construction would be reduced by tracing a feedback against federal construction costs from federal income tax revenues levied by the Government against the profits of the contractors and the wages of the construction crews. Federal funds are no more or less amorphous than state funds. A federal project in Montana doesn't cost less because the contractor is a private individual in a high personal income tax bracket generating substantial revenues for the Federal Government as he labors to construct the project. There is no authority in fact, case law or logic for the Court's accounting method in finding "discrimination."

f) *Conclusion on Lower Court's Mis-application of Phillips Definition of Discrimination*

If the lower court's interpretation of the *Phillips Chemical* test for Supremacy Clause discrimination is allowed to stand, the relationship of the states to the Federal Government in this field of state taxation would be back at the pre-*Dravo* days. The "workable" judicial accommodation between the interests of the states' power to tax and the concerns of the "Nation" referred to in *United States -vs- Boyd* (378 U.S. 39, 51) will have been lost. It is respectfully submitted that this Court should not allow the lower court holding to stand.

g) *Application of "Discrimination" Under United States -vs- County of Fresno*

The Supreme Court handed down its decision in *United States -vs- County of Fresno* on January 25, 1977, which was after both *Kiewit* cases had been decided by the Montana Supreme Court, after the statement of contentions of the parties and trial of the case below, but prior to the lower federal court's decision here.

California tax laws impose a tax on the possessory interest which private citizens hold in non-taxable, publicly-owned real property. Thus, private renters of federal properties have to pay a tax on the fair rental value of the property leased by them. (Title 18, Cal. Adm. Code, Section 21(b) (1971))

In *Fresno,* Forest Service employees occupying residences rented from the federal government challenged the tax as being discriminatory against them (and the federal government) because no like tax is imposed on renters of privately-owned property. However, under the authority of *United States -vs- Detroit,* 355 U.S. 466 (1958), the Court held that the property tax on owners (lessors) or private rental-housing can be presumed to be passed down to the renter-lessee:

> "Similarly, here the State of California imposes a property tax on owners of nonexempt property which is passed on by them to their — lessees. Consequently, the appellants who rent from the Forest Service are no worse off under California tax laws than those who work for private employers and rent houses in the private sector."
>
> *United States -vs- County of Fresno,* 429 U.S. 452, 465

The spirit of the *Fresno* rule is met under the California tax statutes by the inference or conclusion that the rent paid by an individual renting residential property in the private sector includes "passed-down" taxes matching the California tax on Forest Service renters. No proof of an exact match of tax impact on federal and private renters nor proof of actual pass-down in every instance ever was required. The Montana Act is much more explicit. The members of the class in Montana similarly situated to the Federal Contractor — e.g., the public contractor performing a contract for a Montana city, incorporated town, school board, etc., is a *taxpayer* who pays identical taxes under the same Act as a federal contractor performing a job for the Federal Government. And such tax impact as the Federal Government experiences under the Act is experienced dollar for dollar and penny for penny by public owners of school or municipal construction projects such as sewage lagoons or irrigation districts, etc!

Under the *Fresno* rule, the California renters in the private sector (and their tax-impacted lessors) are relied upon under *M'Culloch* concepts to play watchdog roles on behalf of themselves and their fellow class members (including renters from the Government and the Government itself) in opposing oppressive taxation by some future California Legislature. Appellants respectfully submit that a comparable role can and will be played as to the Montana Act by the contractors working for cities and school districts, etc., and by their contractees — the tax- and cost-conscious school board members and ranchers on irrigation district boards. They well might be expected to outperform their California counterparts in that as to the Montana tax, the

economic impact is not guised in passed-down rent but is a line item paid by the contractor and precisely tied (1%) to the construction contract awarded by the particular Board. Furthermore, such boards epitomize the diligent tax- and cost-conscious citizen watching expenses for his constituents.

The rule of *M'Culloch* as brought up to date through *Dravo, Phillips Chemical* and *Fresno County,* therefore, simply is:

> "The rule to be derived from the Court's more recent decisions (*Dravo,* et al.) then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on other similarly situated constituents of the State."
>
> *United States -vs- County of Fresno,* 429 U.S. 452, 462

And such current rule also accords with *M'Culloch,* since the Court there limited its holding so as not to:

> "extend to a tax — imposed on the interest which the citizens of Maryland may hold in this institution (the bank) *in common with other property of the same description throughout the State."* (Emphasis by Fresno Court)
>
> *United States -vs- County of Fresno,* 429 U.S. 452, 459

h) *Lower Court Misconstrues Fresno and Applies It in the Context of Equal Protection Discrimination*

The Lower Court makes no analysis of *Fresno* in the context of discrimination under the Supremacy Clause. The case is cited only once in the opinion and there in support of the Court's conclusion that the classification for tax purposes between public and private contractors is unjustified and so discriminates against the Government.

> "It is manifest to us that as between (public?) Contractors and large structure private contractors (footnote) there is no reasonable or rational basis for the demonstrated unequal treatment under the Act." (Parenthetical inserts supplied)
>
> J.S. App. 16 citing *Fresno,* 429 U.S. 452, 462
>
> See court footnote expanding on equal protection concepts

And since nothing in *Fresno* deals with equal protection tax classification standards as in *Madden* and *Allied Stores,* supra, page 19, the Lower Court's opinion adds great confusion to the proper standard for making a determination of alleged discrimination in cases of this nature.

i) *Conclusion on Lower Court's Finding of Discrimination Against the Federal Government*

Montana recognizes in cases such as this that the Supremacy Clause must be abided by and the requirement of non-discrimination against the Federal Government and those with whom it deals must be met. And it is clear from the *Phillips Chemical* and *Fresno County* cases that "discrimination" under the Supremacy Clause involves different legal pre-

cepts from "discrimination" under the Equal Protection Clause.

Montana further believes that the Supremacy Clause, non-discrimination rules announced in *Phillips Chemical* and *Fresno County* cases are reasonable, clear and imperative. And, as set forth above in this Argument, Appellants submit that the Montana Act passes muster under such tests AS SET FORTH IN THE OPINION LANGUAGE OF THE SUPREME COURT.

But Appellants respectfully submit that the interpretation of *Phillips Chemical* and *Fresno County* cases made and applied by the Lower Court are disastrous of the new *M'Culloch* rule trend adopted by the Supreme Court in *Dravo* and *King & Boozer* and approved by the Congress in *Boyd.* No state tax case otherwise valid under *Dravo* can pass the Lower Court's discrimination test that the tax itself can be deducted from the cost of state projects to show a "discrimination" cost imbalance between the dual governments violative of Supremacy Clause rules. And the Lower Court's citation of the *Fresno* case rather than *Madden* or *Allied Stores,* etc., in finding equal protection "discrimination" greatly muddies the water for the states.

The Montana Act is no "scheme" (Motion to Affirm 11) to bilk the Government. Under it, the State of Montana in a fair and candid manner can force transient contractors doing business in Montana for state, federal and local public projects to pay property taxes on evanescent construction equipment used and income taxes earned in Montana. (*Kiewit #1,* J.S. App. 112, 113) Additionally, a modest amount of true tax revenue is raised which impacts identically as to cost on the State, the Federal Government and local

public entities. As guardians for themselves and the Federal Government against any oppressive augmentation of tax by the Legislature, there stand the school boards, etc., composed of cost- and tax-conscious voting private citizens.

Ours is a federalist system of government where the dual sovereignties must forever co-exist:

> "The States are, and they must ever be, co-existent with the national government. Neither can destroy the other. Hence, the federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States or prevent their efficient exercise."
>
> McReynolds Dissent in *Panhandle Oil Co. -vs- Mississippi,* 227 U.S. 218, 226

While the dollars at risk under the Lower Court's decision are important to Montana, of far more importance to it and to all of the states is the lawful power consistent with the Equal Protection Clause and the modern application of the Supremacy Clause to run its own show and discharge its obligation to its citizens in the manner specified by them. Very possibly there will be more federal funds allocated in Montana under the revenue sharing program than this tax has generated or will foreseeably generate. But the several states must not be tied to the federal apron strings; nor should the Federal Government be encouraged to be unreasonably testy of the efforts of their counterparts in this system of dual governments to separately discharge their obligations to their citizens.

Appellants respectfully submit that the Act is valid under the Equal Protection Clause and under the Supremacy Clause. The Lower Court completely misconstrued and misapplied the Supreme Court authorities in the field to the total confusion and frustration of the states. The judgment should be reversed and the constitutionality of the Act affirmed.

III.

THE GOVERNMENT ELECTED TO LITIGATE ITS CHALLENGE TO THE CONSTITUTIONALITY OF THE ACT IN THE COURTS OF THE STATE OF MONTANA AND IS THEREFORE BARRED FROM RELITIGATING THEM IN THE FEDERAL COURTS.

In the two opinions issued by the three judge federal court in this matter, a full determination of whether or not the Government had freely and without reservation litigated its challenge to the Act in the state court has never been made. In the court's Order of November 18, 1974, (J.S. App. 65) the court in footnote 1, p. 69 did not decide but specifically held open the question of whether or not under the facts and circumstances of the case the Government had submitted its claims to the courts of Montana and was therefore barred from relitigating the question in the Federal Court.

In the final opinion and order of the majority (J.S. App. 5) the court discussed in a very brief fashion the issues relating to collateral estoppel and res judicata (see this brief, post 46 for Montana's contention relative to those issues) but never discussed the question of whether or not the Government was barred from relitigating its entire case.

A review by this court of the record will clearly indicate that the Government did freely and without reservations submit all of its claims in the state court and is now barred from relitigating them at this time.

Appellants cite *England -vs- Louisiana Medical Examiners*, 375 U.S. 411, (1964) which supports this position. The ruling of *England*, supra, requires that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, he thereby gives up his right to return to the federal courts to renew the litigation. A review of the facts in this case indicates clearly the Government has done exactly that in this situation.

The Government filed its complaint in the federal court in April, 1971 less than a month after a near-identical complaint was filed in the state court (Kiewit #1). Both the complaint in *Peter Kiewit*, and the original complaint in the litigation are attached to the appendix herein, p. 33 and 9 respectively, and a review of them indicates that what the plaintiff Peter Kiewit was requesting was essentially identical to what the Government requested in their own complaint. After the filing of the complaint, the parties entered into a stipulation (J.S. App. 49) which was later amended (J.S. App. 160) but which clearly indicates the intent of the parties to hold the federal action in abeyance while the issues were litigated in the state court.

Whether or not the order affectuating the stipulation of the parties was denominated as one for a continuance or abstention is of little importance when the reasons justifying the continuance are the

same as used for justifying the use of the abstention doctrine. The doctrine evolved out of the equitable powers of the federal court allowing the federal court to stay proceedings on the ground that if the questions of state law were first decided by state courts the settlement of those questions might end the controversy; therefore, the matter would be deferred in the federal court pending a decision by the state court. See *England*, supra, *Harrison -vs- N.A.A.C.P.*, 360 U.S. 167 (1959), *Louisiana Power and Light Co. -vs- Thibodaux*, 360 U.S. 25 (1959).

The stipulations and orders entered in this matter leave no doubt that such was the intention of all the parties. The orders and stipulations provided that this matter would be held without date pending a final resolution on *Kiewit #1* by this very court. Whether or not the order was specifically entitled "abstention" does not change the effect of what happened. The parties hereto wanted the abstention doctrine to apply so that if the Supreme Court of Montana ruled the Act unconstitutional in *Kiewit #1*, this case would be terminated. The parties provided specifically for an appeal to this court, which was filed but ultimately negated by the Solicitor General. Assuming then the doctrine is applicable, it is then necessary to determine whether or not the Government litigated freely and without reservation its claim in the state courts, (*England*, supra).

A review of the record indicates that the Government has so litigated its claims. The Governments Answer to Request for Admission number 69 listed in the appendix page 76, lists the specific aspects of the original *Kiewit* case over which they exercised control. The complaints themselves establish that

the issues were essentially identical. Further, the appeal which was filed with this court from the original *Kiewit #1* decision, was dismissed at Kiewit's request after the then Solicitor General, Erwin N. Griswold, indicated his disapproval of the appeal and withdrew the Government's financial support. The Government has completely failed to show when or how it informed the state court of any intention to return to the federal action. The record establishes that it unreservedly briefed, argued and obtained a decision on all issues in the state courts. After two years of active litigation through the Montana courts and after having come to the door of this very court, the Government after seeking consultation with corps of army engineer attorneys, tax department attorneys and of the Solicitor General himself, endeavored to abandon its earlier election of full scale litigation in the state court and to reenter the federal forum and start over again.

> "We explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state court, litigates them there, or has them decided there, then, whether or not he seeks direct appeal of the state court decision in this court, he has elected to forego his right to return to the district court." *England*, supra, page 47.

It is incumbent on the Government to demonstrate how they reserved any of their claims in the state court. The state respectfully submits that the Government in this instance freely and without reservation submitted its constitutional challenges of this Act to the courts of Montana and under the decision of *England*, supra, is precluded from reinstituting the same issues in this forum.

IV.

THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES THE GOVERNMENT FROM RELITIGATING THOSE SPECIFIC ISSUES DECIDED IN THE ORIGINAL PETER KIEWIT LITIGATION.

Assuming this court were to find that in some way the Government did not freely and without reservation submit its claims to the state court, the doctrine of collateral estoppel precluded the Government from relitigating in this forum those specific issues previously decided by the Montana court.

As has been established, the Government was the real party in interest (M.A. page 78, subsection M) in the *Kiewit #1* litigation, and under the doctrine of collateral estoppel, the same parties are precluded from relitigating the same issues in a different cause of action. See *Drummond -vs- United States,* 324 U.S. 316 (1945), *Southern Pacific Railroad -vs- United States,* 168 U.S. 1 (1897), *Gardner -vs- Public Bank,* 417 F.2d 75 (1969), *Western Montana Production Credit Association -vs- Hydrophonics, Inc.,* 147 Mont. 157, 410 P.2d 937 (1966), 1-B Moore F. P. 621-622 Sec. 0.405.

The issues raised in the previous litigation which have been reinstated in this case are the following:

(a) Discrimination against the United States. The Government in paragraph 24 (a) of its amended complaint (M.A. page 65) and in section 2(a) page 12 of the pre-trial order (J.S. App. 93) contended that the act was illegal because it discriminated against the United States, its agencies, instrumentalities and those with whom it does business. Referring to the decision by the majority herein (J.S. App. 13) it was

held that the act was in fact invalid because the imposition of the tax discriminated against the Government and in favor of the state.

> "We conclude and declare that the imposition of the G. R. tax under the act upon the contractors subjects the government to discrimination in favor of the state, all in violation of the Supremacy Clause. . .
>
> However, nothing in the issues raised presented, nor did the contractor Kiewit have standing to raise on behalf of the Government in *Kiewit,* the Government's current issue of discriminatory effect upon it as an owner-builder by the imposition of the G. R. tax upon its contractors in violation of the Supremacy Clause." J.S. App. p. 14-15.

However, such a decision fails to follow the plain language in *Kiewit #1.* The Supreme Court of Montana indicated the issue raised by *Kiewit* on behalf of the Government as follows:

> "The second half of the discrimination question raised by Appellant is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private non-governmental parties. Appellant contends granting a preferred tax status to a substantial number of taxpayers, contractors performing work for private owners, and failing to grant a comparable status to construction contractors of the United States, constitutes unconstitutional discrimination against the United States and those with whom it deals." (J.S. App. 119)

Clearly that specific contention of the Government has been again raised in this present case. What the

majority opinion tries to do is to discount the effect of the decision by the Supreme Court of Montana by simply not acknowledging the existence of the language. However, it is present and it cannot now be argued that the issues were not raised in the original Kiewit litigation. The Kiewit litigation could have involved a very simple legal question of whether or not a tax *upon* public as opposed to private contractors had a proper equal protection basis as being a proper classification. In addition to that issue, the supremacy issue of the alleged discrimination against the Federal Government was also raised at its instance and decided adversely. Now to allow the Government to relitigate the same questions in a different forum is to fully negate the effect of the decisions cited herein.

Finally, the majority decision also discusses the issue of whether or not classification between public and private contractors is permissible. Although the opinion states that reaching such a decision is not necessary to their disposition, the opinion then goes on to rule that the grounds relied upon to support such a classification are in fact improper for Fourteenth Amendment classification, and the Act is therefore unconstitutional. There is no question but what that specific question was presented to the Supreme Court of Montana by the Government, (J.S. App. 119) and cannot now be raised again in these proceedings.

As stated by Judge Kilkenny in his dissent, the Government should not be allowed to relitigate the issues previously decided in this matter.

> "At a minimum, therefore, the Federal Government is collaterally estopped from relitigating the issues that were tried in the states courts. Thus, even if the *England* rule does not apply, I would conclude that the doctrine of collateral estoppel applies and it precludes our consideration of the merits of the two substantive issues reached by the majority." J.S. App. p. 27.

The Government in its motion to affirm attempts to mitigate the effect of this Argument by making the assertion that because the Montana Supreme Court proceeded on the theory that the tax generated under the Act might result in a total washout, the doctrine of collateral estoppel does not apply. What the Government has admitted, is that it, as the real party in interest, had the issues litigated but because the reasoning of the Montana Supreme Court covered many arguments, the doctrine of collateral estoppel does not apply. The Government cannot be allowed to relitigate issues raised and presented on their behalf and at their behest in a separate forum in the hope of obtaining a more desired result. Appellant urges this Court to accept the reasoning of Judge Kilkenney as stated above, and rule that the two substantive issues have been previously raised and the Government is therefore precluded from relitigating them at this time.

CONCLUSION

The Lower Court has misconstrued and misapplied *Phillips Chemical* and *Fresno County* rules. It has hopelessly garbled for the states the critical issue of whether "discrimination" is solely an equal protection concept, a Supremacy Clause concept, *or both.* In testing for equal protection discrimination, the Lower Court refused to apply established rules of *Madden.* It has refused to recognize the applicability of *England* or the basic rules of collateral estoppel.

The Lower Court decision sounds in concepts abandoned by the Court at the times of the decisions of *Dravo, King & Boozer* and more recently, *Detroit.* The Lower Court would have the "practical" application of *M'Culloch,* as approved by the Congress in *Boyd,* wholly abandoned.

The Act was not conceived as a scheme to bilk the Federal Government. It is a dignified attempt by Montana to meet the needs of its citizens as to tax collection and revenue raising. It in no sense impedes the Federal Government in the discharge of its functions within the concept of *Dravo, et al.* The Act is constitutional and the judgment of the Lower Court majority should be reversed, the constitutionality of the Act upheld, and the litigation dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF MONTANA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1134

STATE OF MONTANA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.S. App. 5-35) is reported at 437 F. Supp. 354.

JURISDICTION

The judgment of the district court (J.S. App. 1-4) was entered on October 18, 1977. The notice of appeal to this Court (J.S. App. 36-37) was filed on December 15, 1977 (J.S. 2). The appeal was dock-

eted on February 13, 1978, and probable jurisdiction was noted on May 22, 1978 (A. 187).

This is a direct appeal from a judgment of a three-judge district court (1) declaring that Title 84, Chapter 35, Revised Codes of Montana, 1947, as amended, and the rules and regulations promulgated thereunder, violate the Supremacy Clause of the United States Constitution insofar as they apply to the United States of America, its contractors, subcontractors and those with whom it deals; and (2) permanently enjoining the enforcement of that statute against those persons (J.S. App. 1-3).[1] The jurisdiction of this Court is conferred by 28 U.S.C. 1253, which authorizes a direct appeal from an order granting permanent injunction in any civil action required by any Act of Congress to be heard and determined by a district court of three judges. Pursuant to 28 U.S.C. 2281, a permanent injunction restraining the enforcement of a state statute on the ground of unconstitutionality can only be granted by a three-judge district court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[1] In its judgment, the court ordered that the federal government's claim for refund of the license fee and gross receipts tax be determined by a single-judge district court (J.S. App. 3).

The relevant provisions of the Montana Contractors' Gross Receipts Tax (Revised Codes of Montana, 1947, as amended, Title 84, Chapter 35, Section 84-3505, *et seq.*, 1975 Cum. Supp.) are set forth at J.S. App. 38-48.

QUESTIONS PRESENTED

1. Whether the Montana gross receipts tax imposed upon contractors with respect to government contracts, which in actual operation burdens the federal and not the state government, violates the Supremacy Clause of the Constitution by discriminating against the federal government and those with whom it deals.

2. Whether the decision of the Montana Supreme Court in *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P.2d 102, bars the United States from challenging the constitutionality of the Montana tax in this case.

STATEMENT

1. Section 84-3505, Revised Codes of Montana (1975 Cum. Supp.) (J.S. App. 40-41) imposes upon public contractors a tax equal to one percent of gross receipts derived from public construction contracts performed in Montana for federal, state or

local governments.[2] The statute defines "public contractor" as "any person who submits a proposal, or enters into a contract, for performing all public construction work in the state with the federal government, state of Montana, or with any * * * city or town council * * * or with any public board, body, commission or agency, authorized to let or award contracts for any public work where the contract cost * * * exceeds $1,000" (Section 84-3501(b), Revised Codes of Montana (1975 Cum. Supp.)) (J.S. App. 38, 83-84).

Private contractors, *i.e.*, those not engaged in work on behalf of any government, are not subject to the gross receipts tax. Nor are the gross receipts of "public contractors" derived from private work subject to the tax (J.S. App. 40-41, 90). Thus, receipts from construction work performed for federal, state or local governments in Montana are subject to a tax that receipts from private work are not (J.S. App. 84, 88, 90; A. 25).

A contractor may credit against the gross receipts tax the taxes paid on his personal property used in

[2] Prior to June 30, 1975, the one percent tax was imposed with respect to each contract upon the gross receipts of the prime contractor and of each subcontractor. Thus, the cumulative gross receipts tax could exceed one percent of the total contract price. The statute was amended to provide that the total amount of the gross receipts tax for any single contract (including subcontracts) could not exceed one percent. Montana Session Laws of 1974, c. 180, Section 1 (J.S. App. 40-41, 89).

There is also an annual license fee of $10 to $200 (depending upon the dollar amount of construction the license authorizes) (J.S. App. 40).

his contracting business in Montana. He may credit the balance of the gross receipts tax against the Montana individual income tax or the corporate income tax (Section 84-3514, Revised Codes of Montana (1975 Cum. Supp.) (J.S. App. 47-48)). The credits against the individual income tax or the corporate license tax may be used within a five-year period (Sections 84-1508.2(2), 84-4920 and 84-4922, Revised Codes of Montana (1975 Cum. Supp.)). The effective rate of the gross receipts tax thus varies among public contractors because of differences in their personal property and income taxes, but it averages approximately one-half of one percent of gross receipts (J.S. App. 11-12, 87-88, 90).[3] The tax is normally passed on by the federal contractor to the federal government and thus increases the cost of construction for federal projects (Pltf. Ex. 1, A. 80-81; A. 86, 98-108, 112-117, 164).[4] Since

[3] As of July 7, 1975, the State of Montana had collected $12,839,878.45 in gross receipts taxes and had retained $5,658,437.29 after all credits had been taken (J.S. App. 92). Federal projects account for at least 65.8 percent of the amount of gross receipts tax collected and for at least 57.2 percent of the balance retained after credits. However, these figures do not include all federal projects. Accordingly, the percentage of the tax collected from contractors on federal projects retained by the state from these projects would be higher than 57.2 percent (I-Tr. 169-171; Pltf. Ex. 7, p. 4).

[4] The State actually refunds the credit for personal property taxes because the gross receipts tax is paid before the amount of the credit is determined. The Department of the Army requires that its contractors return these refunds generated by Army contracts. The other federal agencies do not include this provision in their contracts (A. 106, 133, 136, 161, 164-165).

the services performed by contractors on behalf of governments and private parties are comparable, the only essential difference between a federal construction project and a private construction project is that the federal government bears a higher cost on account of the one percent gross receipts tax (J.S. App. 16; A. 108-111, 181-183).

A contractor's bid for a state construction project would not be substantially different from his bid for an identical federal construction project (A. 101). The actual cost of the construction project to the federal government is, however, greater than the actual cost of the identical construction project to the state government. This difference reflects the fact that while the federal contractor pays the tax and passes it on to the federal government, the state withholds the one percent tax and never actually pays it over to the contractor unless local property tax credits are applicable (A. 86-88, 90-91, 98-99, 102, 130-155, 171-172).

2. The United States brought this action in the United States District Court for the District of Montana against the State of Montana, its Department of Revenue and its Director of Revenue. It sought, *inter alia*, (1) a declaratory judgment that the imposition of the gross receipts tax upon the United States, its contractors, subcontractors or those with whom it dealt violated the Supremacy Clause of the United States Constitution, (2) a permanent injunction against imposing the tax on those persons, and (3) a refund of the taxes collected from those persons (J.S. App. 80-81).[5] The case was continued on stipulation pending resolution in the Montana state courts of *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P.2d 102 (J.S. App. 49-58).

In *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P.2d 102 (*Kiewit #1*) (J.S. App. 105-123), the contractor, in litigation financed and directed by the United States, sought a refund of the gross receipts tax that it had paid on amounts received under its contract with the Department of the Army, contending that the tax unconstitutionally discriminated against those who dealt with the United States.[6] Under its contract with the Department of the Army, Kiewit was prohibited from taking advantage of the credit provisions of the gross receipts tax.[7] The Montana Su-

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[5] The United States also sought to have the license and regulatory provisions of Title 84, Chapter 35, Revised Codes of Montana, 1947, as amended, declared unconstitutional and to enjoin their enforcement against contractors dealing with the United States (J.S. App. 78, 80). The Montana Supreme Court in *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 151-153, 505 P.2d 102, 109-110, determined that the regulatory provisions of the Montana Act were not applicable to the United States, its contractors or its subcontractors (J.S. App. 7, n. 2, 78-79, 121-122).

[6] The United States appeared as *amicus curiae* in the Supreme Court of Montana in *Kiewit #1* (J.S. App. 86).

[7] This contract provision, and the policy embodied in it, have since been abandoned. After 1971, the federal government has required its contractors to take advantage of all credits, including credits available for prior periods (J.S. App. 11, 91).

preme Court held, *inter alia*, (1) that the gross receipts tax was a revenue enforcing measure, (2) that but for the prohibition in the federal contract against using the credits, Kiewit could have recovered most if not all of the gross receipts tax paid (J.S. App. 111-113),[8] and (3) that the tax did not unconstitutionally discriminate against contractors dealing with the United States. In the Montana Supreme Court's view, the legislative classification between public and private contractors was reasonable because public contractors were required to comply with certain safety precautions (J.S. App. 117-120). Moreover, the court rejected the contractor's claim of discrimination against the United States because it concluded that the Montana tax treats the federal government in the same manner as the State of Montana treats itself (J.S. App. 121). Accordingly, the court rejected Kiewit's claim to a refund of the gross receipts tax refund (J.S. App. 85-86, 105-123).

During the period that the present case was continued, the Montana Supreme Court decided *Peter Kiewit Sons' Co.* v. *Department of Revenue*, 166 Mont. 260, 531 P.2d 1327 (*Kiewit #2*), which differed from *Kiewit #1* only in adjudicating the

[8] Kiewit incurred a personal property tax liability of $35,803.22 on its heavy equipment. It sought a refund of gross receipts taxes of $8,726.47. If it had claimed the personal property tax credit, it would have been entitled under Montana law to a refund of that latter amount (J.S. App. 109, 112).

amounts of gross receipts taxes due at different times. The Montana Supreme Court held that its decision in *Kiewit #1* was *res judicata* on the constitutional challenge to the gross receipts tax (J.S. App. 124-130).[9]

After the decision in *Kiewit #2*, the present case was heard on the merits by a three-judge district court. The State of Montana contended that the imposition of the gross receipts tax upon contractors dealing with the United States did not violate the Supremacy Clause of the Constitution because the tax was also imposed upon contractors dealing with the state, and that the United States was bound by the decision of the Montana Supreme Court in *Kiewit #1* (J.S. App. 9-10, 20-35, 94-100). The district court held, with one judge dissenting, that the Montana gross receipts tax upon contractors dealing with the United States violated the Supremacy Clause of the Constitution because it discriminated without justification against those contractors and in favor of contractors dealing with private entities, and imposed upon the United States costs greater than those borne either by private entities or by the State of Montana (J.S. App. 8-9, 13-17, 92-94). The district court further held that the United States was not bound by the *Kiewit* litigation (J.S. App. 15).

[9] The parties did not agree to continue the present case pending a decision in *Kiewit #2*. The government did not appear as *amicus* in that case.

SUMMARY OF ARGUMENT

I.

This Court has consistently held that "a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals" (*United States* v. *City of Detroit*, 355 U.S. 466, 473). This proscription is inherent in the federal government's immunity from state taxation under the Supremacy Clause. See, *e.g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316; *United States* v. *County of Fresno*, 429 U.S. 452, 463-464; *Phillips Chemical Co.* v. *Dumas School Dist.*, 361 U.S. 376, 385-387; *Moses Lake Homes* v. *Grant County*, 365 U.S. 744, 751.

In *County of Fresno*, the Court upheld a county tax, authorized by state law, on the possessory interests of those who occupy federally-owned houses on tax-exempt government land. This tax corresponded to the tax which California imposed on the owners of private land, which was presumably reflected in the rent paid by private lessees. In upholding the constitutionality of the tax upon federal lessees, the Court reaffirmed the teaching of *McCulloch* that the states cannot impose taxes bearing on the federal government but that taxes bearing indirectly on both private and federal interests are subject to a "political check against abuse" and are therefore permissible (429 U.S. at 458). As the Court observed, "the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the

tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State" (footnote omitted) (429 U.S. at 462). If the tax had not been imposed on private lessees, it would have been invalid as to the federal lessees, for it then would have been discriminatory. *Id.* at 463 n. 11, 465.

The district court correctly held that the Montana gross receipts tax discriminated against the United States and those with whom it dealt, and therefore violated the Supremacy Clause of the Constitution. The tax at issue is imposed upon gross receipts derived from public construction contracts performed in Montana for federal, state or local governments. Thus, the tax is not "imposed equally on other similarly situated constituents of the State" because it is not imposed on private contractors. Under the principles announced in *McCulloch* and reaffirmed in *County of Fresno*, the tax cannot pass constitutional muster.

Contrary to the appellants' argument, the fact that the tax is also imposed on contractors for the state does not save it from unconstitutionality. The payment of the tax by state contractors is irrelevant because such payments simply reflect the transfer by the state from its left pocket (the contracting office) to its right pocket (the tax collector). Thus, if the tax were imposed on private contractors, the tax would be nondiscriminatory because there would be a "political check" against oppressive taxes that would serve to protect the federal government. Since

the state legislature would presumably not impose oppressive taxes on its citizens, any tax that puts the federal government to the same burden as the state's citizens would be constitutional. However, if, as in the instant case, private contractors are exempt from the tax, there is no check to prevent the legislature from raising the tax to oppressive levels. Its citizens will not protest and the state, though it transfers larger amounts of money from pocket to pocket, in the end pays nothing.

It is therefore evident that the imposition of the tax on private contractors is the only real protection that the federal government has against discrimination. Once that check is eliminated, as in the instant case, the federal government stands alone as a true taxpayer to the state. Appellants' claim that its own contractors must also pay the higher tax is illusory; whatever the contractors pay to the state is reimbursed by the state and, no matter how high the tax, the state merely pays it from one pocket to another.

II.

The district court also correctly held that the federal government was not barred from litigating the merits by the decision in *Kiewit #1*, a case that one of its contractors brought in the Montana state courts. Neither the rule of *England* v. *Medical Examiners*, 375 U.S. 411, nor the doctrine of collateral estoppel, foreclosed the federal court judgment.

England held that parties who initially present their federal claims to a federal court cannot litigate those issues in that court where (1) the federal court abstains and sends the parties to state court for a resolution of state law grounds, (2) those parties "freely and without reservation" litigate all their claims in the state courts, (3) the parties in each action are identical, and (4) the state court has jurisdiction over the parties. These conditions are not met here.

First, the district court never invoked the doctrine of abstention. That doctrine permits a federal court to decline to exercise its jurisdiction in cases presenting a federal constitutional issue that might be mooted by a state court determination of pertinent state law, or where there is a difficult question of state law that is best resolved by a state court. It is therefore not applicable to this case which involves only a constitutional claim of immunity from taxation. The continuance in this case can neither be characterized as, nor analogized to, abstention. The parties to this litigation merely agreed to continue the case while the state courts considered *Kiewit #1*, a separate action brought by a contractor, in which the federal government appeared as *amicus curiae*.

Second, in agreeing to the continuance, the United States never "freely and without reservation" submitted its claims to the state court. The state court thus never acquired jurisdiction over the federal government and the federal government is not bound by the judgment in that case. Indeed, in this

action, the federal government sought a ruling as to the effect of the tax with respect to all of its contracts. The *Kiewit* case involved only one type of contract—and that one no longer effective. The rule in *England* therefore did not prevent the district court from reaching the merits of the dispute here.

Nor does the doctrine of collateral estoppel bar the United States from litigating the merits of its claim. That doctrine "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599-600.

Here, the controlling facts changed between *Kiewit #1* and the instant case. The contract at issue in *Kiewit #1* forbade the contractor from claiming the credit and refund provisions of the gross receipts tax. This provision is no longer applicable in the contracts involved in this litigation.

The decision in *Kiewit #1*, moreover, did not determine the issue here. Because of the amount of heavy equipment that Kiewit employed in Montana, it was not established that the gross receipts tax here in question would have imposed any financial burden upon the contractor. Had it claimed the credit, it appeared that Kiewit's personal property tax would have eliminated all of the public contractor's gross receipts tax. Inded, the Montana Supreme Court proceeded upon the assumption that there might in all cases be "a total washout of the 1% gross receipts payments" (J.S. App. 109, 111-113). Though Kiewit might have been relieved of all of the public contractor's tax had it claimed the available credit, and though the Supreme Court of Montana was uncertain of the ultimate fiscal impact of the tax, the record in this case establishes that with respect to its contractors, the effective rate of the tax borne ultimately by the United States, after taking all credits available, will be approximately one-half of one percent of gross receipts (J.S. App. 11, 87-88). Thus, the factual assumption upon which *Kiewit #1* rests is lacking in this case.

ARGUMENT

I.

THE MONTANA CONTRACTORS' GROSS RECEIPTS TAX VIOLATES THE CONSTITUTIONAL IMMUNITY OF THE UNITED STATES FROM STATE TAXATION BECAUSE IT DISCRIMINATES AGAINST THE FEDERAL GOVERNMENT AND THOSE WITH WHOM IT DEALS

"[S]ince 1819, when Chief Justice Marshall in [*McCulloch* v. *Maryland*, 4 Wheat. 316] expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application." *United States* v. *County of Allegheny*, 322 U.S. 174, 176. In determining the reach of that constitutional immunity, the Court has often considered whether property belonged to the United States under particular arrangements with

private parties or whether particular entities were federal instrumentalities. "But unshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation" (*id.* at 177). See also *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 117-118; *Department of Employment* v. *United States*, 385 U.S. 355, 358-359; *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, 340; *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 612-613. Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland*, *supra*, 4 Wheat. at 436.

Inherent in the *McCulloch* immunity principle is the well-established proposition that "a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals." *United States* v. *City of Detroit*, 355 U.S. 466, 473. Accord: *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385-387; *Moses Lake Homes* v. *Grant County*, 365 U.S. 744, 751.

We submit that the district court correctly held that the Montana contractors' gross receipts tax discriminates against the United States and those with whom it deals, and thus violated the Supremacy Clause of the Constitution. "The rule to be derived from the Court's more recent decisions * * * is that the economic burden on a federal function of a state

tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State" (footnote omitted). *United States* v. *County of Fresno*, *supra*, 429 U.S. at 462. But, as we shall show, the Montana tax is not "imposed equally on other similarly situated constituents of the State" because it is not imposed on private contractors. It is imposed on federal contractors. Thus, its unconstitutionality is clearly established under the principles of *McCulloch* and *County of Fresno*.

A. Article VI of the Constitution provides that "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme law of the Land * * *." This principle of constitutional supremacy of the federal government was the basis of the Court's landmark decision in *McCulloch* v. *Maryland*, *supra*, which struck down a state tax upon the issuance of notes by the Bank of the United States.

In *McCulloch*, the State of Maryland imposed a tax on notes issued by "any Bank * * * established * * * without authority from the state" (4 Wheat. at 320). The only such bank in Maryland was the Bank of the United States, created and incorporated by Act of Congress. In holding that the tax violated the Supremacy Clause, the Court observed that the power to tax the bank "by the states may be exercised so as to destroy it" (*id.* at 427) and rejected the state's argument that the power to tax

was equivalent to the power to destroy only where the taxing power was abused. As the Court stated, "[w]hen [the people of a state] tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control" (4 Wheat. at 435). Or as the Court put it most recently in explaining the *McCulloch* rationale, "the political check against abuse of the power to tax a State's constituents is absent when the State taxes only a federal function. A State's constituents can be relied on to vote out of office any legislature that imposes an abusively high tax on them. They cannot be relied upon to be similarly motivated when the tax is instead solely on a federal function" (footnote omitted) *United States* v. *County of Fresno*, 429 U.S. 452, 458-459.

McCulloch turns on the fact that the state had directly taxed an instrumentality of the United States. But if the State had taxed the property of private persons generally, such a tax could have constitutionally included notes of the Bank of the United States held by private persons. For the Court stated that its decision did not "extend to a tax * * * imposed on the interest which the citizens of Maryland may hold in this institution [the bank], *in common with other property of the same description throughout the state*" (emphasis added) (4 Wheat. at 436).

The teaching of *McCulloch* is therefore that a state cannot impose a tax directly upon the federal government. However, it may constitutionally impose a tax upon those who deal with the federal government as long as the tax is imposed equally on all those who stand in comparable economic positions within the state. In these circumstances, the broader class of taxpayers provides the United States with indirect political representation and establishes a political check against abuse of the taxing power that would otherwise be absent if the tax were limited to those who deal with the federal government. Thus, the taxation of similarly situated constituents within the state insures that the tax will not discriminate against the United States and those with whom it deals.

This reading of *McCulloch* was confirmed by the Court's recent decision in *United States* v. *County of Fresno*, *supra*. There, the Court upheld a county tax, authorized by state law, upon the possessory interests of those who leased federally-owned houses on tax-exempt land owned by the United States. This tax corresponded to the tax which the counties imposed on private realty, which was presumably reflected in the rent paid by private lessees.

In upholding the tax on the federal lessees, the Court reaffirmed the rationale of *McCulloch* that the states cannot impose a tax exclusively bearing on a federal function but that taxes bearing on both private and federal interests are subject to a "political check against abuse" (429 U.S. at 458) and are

therefore consistent with the policies underlying the Supremacy Clause. "So long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory * * *." *Id.* at 460. Accord: *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 150 (gross receipts tax imposed on both private and public contractors). Thus, "the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the state" (footnote omitted) (429 U.S. at 462). Since the California tax was on possessory interests of private persons in improvements on all types of exempt land, thereby including but not limited to land owned by the federal government, it did not threaten to destroy the federal function and therefore did not violate the Supremacy Clause (see *id.* at 463 n.11). Moreover, as the Court observed, California imposed a property tax on the owners of nonexempt property that is " 'passed on by them to their * * * lessees.' " Accordingly, the federal lessees were no worse off under California tax laws than those who rented houses in the private sector. *Id.* at 465. See also *United States* v. *City of Detroit*, *supra*, 355 U.S. at 473-474. However, if a comparable tax had not been reflected in the rent paid by private lessees, the tax at issue would have been invalid as to the federal lessees, for it would have "discriminate[d] against the Government or those with whom it deals." *Phillips Chemical Co.* v. *Dumas School Dist.*, *supra*, 361 U.S. at 387.

B. In light of the foregoing principles, the Montana gross receipts tax cannot constitutionally be applied to federal contractors. Pursuant to the statute, "each public contractor shall pay to the state an additional license fee * * * equal to one per cent * * * of the gross receipts from public contracts during the income year for which the license is issued * * * (Section 84-3505(5), J.S. App. 41). The term "public contractor" is defined to include "any person who submits a proposal to or enters into a contract for performing all public construction work in the state with the federal government, State of Montana, or with any other * * * public board, body, commission, or agency authorized to let or award contracts for any public work when the contract cost * * * exceeds * * *$1,000" (Section 84-3501, J.S. App. 38). By its terms, the tax applies to those contractors who perform services for the federal government. However, a contractor who performs the same services for a private party is not subject to the tax. Thus, the tax is not "imposed equally on the other similarly situated constituents of the State" (*United States* v. *County of Fresno*, *supra*, 429 U.S. at 462) because federal contractors are worse off than their counterparts who work in the private sector. Cf. *United States* v. *County of Fresno*, *supra*, 429 U.S. at 465. This discrimination in favor of private parties at the expense of the United States and those with whom it deals is barred by the Supremacy Clause.

Contrary to appellants' argument (Br. 34-35), the fact that the tax is imposed upon contractors who

deal with the federal, state and local governments does not alter the constitutional analysis. Under the teaching derived from *McCulloch*, a state cannot impose a tax that bears even indirectly upon the operations of the federal government unless it is even-handedly imposed upon *all* of its constituents engaged in identical activities. Here, the pertinent class of similarly situated constituents includes all contractors performing services for amounts that exceed $1,000, not simply those who work for the federal, state and local governments. There is accordingly no justification for excluding private contractors from the analysis when there is no discernible difference between their activities and those of federal contractors. Cf. *Halliburton Oil Well Co.* v. *Reily*, 373 U.S. 64, 71.[10] The policies underlying the

[10] In *Kiewit #1*, the Montana Supreme Court concluded that the statutory distinction between public and private contractors was constitutionally permissible because: (1) defective public works expose the public at large to danger; (2) public contractors must be experienced; (3) public contractors must provide a bond; and (4) public works usually involve elaborate professionally drawn plans and specifications and mandatory inspections (see J.S. App. 117-118). The court found that these factors justified different tax treatment under the Equal Protection Clause.

But it is well settled that the test as to whether a legislative classification is permissible under the Equal Protection Clause is not controlling where the immunity of the United States is involved. *Phillips Chemical Co.* v. *Dumas School Dist.*, *supra*, 361 U.S. at 385; *United States* v. *Allegheny County*, *supra*, 322 U.S. at 191. Indeed, apart from the State of New York (Br. 4-5), the appellants (Br. 39-40) and the other *amici* concede the correctness of this proposition. While the appellants (Br. 18-22, 29-30, 33-40) accuse the district court of confusing the immunity and equal protection issues,

Supremacy Clause demand that those who deal with the federal government be protected against the abuse of oppressive taxation by the imposition of an equal tax burden upon a sufficiently large class of private persons and entities. Under this standard, the Montana tax does not provide the requisite political protection to federal contractors and is therefore unconstitutional.

Appellants seek to distinguish the instant case from *McCulloch* by pointing out (Br. 34-35), as did the Montana Supreme Court in *Kiewit #1* (J.S. App. 121), that the tax is imposed not only on contractors for the federal government, but also on contractors for the state. But as the following example makes clear, the tax on state contractors is illusory and is

the court specifically stated that it was "unnecessary to pass upon the Equal Protection issues" (J.S. App. 15).

At all events, the distinctions proposed by the Montana Supreme Court in *Kiewit #1* have no bearing upon classification for tax purposes but simply go to whether a particular contractor is competent to perform services for a governmental body. See also J.S. App. 15-16. Indeed, the record in this case indicates that many contractors who perform work for private persons do so for governments as well (A. 94-95; I-Tr. 105, II-Tr. 320, III-Tr. 376; Pltf. Ex. 8). Moreover, many bulidings constructed by private contractors are leased to government users and thereby serve the general public (J.S. App. 16; A. 95-101, 108-111, 130-132, 181-185). There are accordingly no significant differences between public and private contractors that would warrant different tax treatment. While the State of New York (Br. 4-5) suggests that the distinction between public and private contractors is justified because it is easier to collect taxes from public contractors, the record does not support such an inference and the appellants do not assert this to be the case.

not sufficient to save the tax from unconstitutionality where a significant segment of similarly situated constituents, *i.e.*, private contractors, are exempt from the tax.

If a contractor working on a job for a private party buys a $100 bag of cement and pays a $1 tax on the purchase, the state gains $1 at the expense of the private party. If a contractor working on a contract for the state buys a $100 bag of cement and pays a $1 sales tax, the state reimburses him $101, and gains nothing. If a contractor on a federal job makes a similar purchase, the federal government reimburses him $101, and the state gains $1 at the expense of the federal government. The state is, in a sense, treating itself better than the federal government, because it pays no tax and the federal government does; however, the tax is nondiscriminatory because the federal government is treated exactly like the private party. Thus the tax would not violate the Supremacy Clause under the *McCulloch* and *County of Fresno* rationale. Because the state legislature will presumably not impose oppressive taxes on its citizens, any tax which puts persons who deal with the federal government to the same burden as the state's citizens generally is constitutional. The fact that the state "pays" no tax is irrelevant; the non-payment simply reflects the fact that the state is transferring money from its left pocket (the contracting office) to its right pocket (the tax collector).

But cf. *United States* v. *County of Fresno*, *supra*, 429 U.S. at 474 n.10 (Stevens, J., dissenting).

If, as in the instant case, the tax on private parties is eliminated in the example, the discrimination against the federal government becomes apparent. The private party pays no tax; the state pays no tax; only the federal government pays the tax. There is no political check to prevent the legislature from raising the tax to oppressive levels and thereby impede the functioning of the federal government. Its citizens will not protest and the state, though it transfers larger amounts of money from pocket to pocket, in the end pays nothing. The federal government pays the tax to the state through its contractors, and the discriminatory effect is clear. The tax is invalid under the Supremacy Clause.

It is therefore evident that the tax on private parties offers the only meaningful protection to the federal government against discrimination. Once the tax on private parties is eliminated, the federal government stands alone as a true taxpayer to the state. The state's claim that its own contractors must also pay the higher tax is illusory; whatever the contractors pay to the state is reimbursed by the state and, no matter how high the tax, the state pays it from one pocket to another.

In sum, the tax in this case is not imposed on private parties. It is imposed only on contractors for the federal government and, ostensibly, on contrac-

tors for the state. Because Montana does not, as a practical matter, pay a tax to itself, the fact that the tax is nominally "imposed" on state contractors is immaterial.

This leaves only the matter of credits. The credits work here to allow a contractor, first, to take a credit for the amount of his personal property tax against the gross receipts tax. Then, the contractor may credit the balance of the gross receipts tax against his income tax. If the gross receipts tax was eliminated by the credits for personal property and income taxes generated by the personal property used in and the income derived from performing the contract with the government, there would be in effect no gross receipts tax at all and no dispute. This, however, is not the case (J.S. App. 12-13, 92). The gross receipts taxes are only half consumed when they are applied to satisfy other taxes. Thus, over time, the effective rate of the gross receipts tax has been one-half of one percent. This is a small tax, but it is a real one. It is not paid by private parties. This one-half of one percent is not paid in any real sense by the state.[11] It is paid by the federal government.

[11] To the extent of the personal property tax credit, the gross receipts tax represents a cost to the state for its construction (A. 87-88, 90-91). This credit, however, represents only part of the gross receipts tax (J.S. App. 92). The balance of the tax, in reality, represents no cost to the state (J.S. 13). Accordingly, the presence of this credit for personal property tax does not detract from our argument that the tax discriminates against the federal government. See *Moses Lake Homes* v. *Grant County, supra.* Compare *Offutt Housing Co.* v. *Sarpy County,* 351 U.S. 253.

It is therefore discriminatory and cannot stand under the Supremacy Clause.

C. *Phillips Chemical Co.* v. *Dumas School Dist., supra,* upon which the appellants (Br. 30-33) rely, is not to the contrary; indeed it supports the position of the United States. In that case, the State of Texas taxed lessees of federal property at a higher rate than it taxed lessees of state property. In striking down the tax, the Court observed that "it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself" (361 U.S. at 385). The Court found the special Texas tax for federal lessees invalid because "it still remains true, as it has from the time of *McCulloch* v. *Maryland,* 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals" (*id.* at 387).

Appellants argue (Br. 31-32) that *Phillips Chemical* requires only that, in taxing those with whom the federal government deals, the state must treat such persons "as well as it treats those with whom [the state] deals itself" (361 U.S. at 385). Focusing on this language, appellants urge that the Montana tax is valid because it is imposed on both federal and state contractors. But as we have shown *supra,* pp. 23-25, the burden of the tax falls on the federal government and not on the state government. At all events, even on the assumption that federal and state contractors are treated equally, the tax would still be invalid

under *Phillips Chemical* because of the exemption for private contractors. Indeed, in analyzing the Texas tax, the Court specifically noted that "there appears to be no discrimination between the Government's lessees and lessees of private property" (*id.* at 381). Thus, *Phillips Chemical* announced no new test of discrimination, much less a test that could be satisfied by the Montana statute. It explicitly adhered to the principles formulated by this Court in *McCulloch* and reaffirmed in *County of Fresno*—if the tax discriminates against the federal government or those with whom it deals, the tax is invalid. Since the Montana tax treats private contractors more favorably than federal contractors, it offends the Supremacy Clause.

D. Appellants (Br. 16-17, 36-39) and the *amici* (Wash. Br. 14-15; Va. Br. 6) further contend that the imposition of the Montana tax upon gross receipts from local governments saves its constitutionality. But the fact that the tax is imposed on receipts from local governments, school districts and other governmental entities makes no difference, even on the assumption that those entities, like the federal government, cannot recover the payments occasioned by the tax (see J.S. App. 12). Once it is shown that the tax discriminates against the federal government by favoring similarly situated constituents within the state, the tax must fall; its constitutionality cannot be restored by showing that the state also discriminates against other governmental entities. For purposes of the Supremacy Clause, one discrimination cannot serve to justify another discrimination

against the federal government and those with whom it deals.

Finally, appellants (Br. 16, 33) and the *amici* (Wash. Br. 17-19; Va. Br. 4-8) argue, as the dissenting judge below stated, that the federal government's reasoning "if followed to its logical conclusion" would effectively invalidate state gross receipts taxes upon all contractors, or sales taxes imposed upon all purchasers of goods, which taxes were upheld in *Alabama* v. *King & Boozer*, 314 U.S. 1; in *James* v. *Dravo Contracting*, *supra*; and in *Mason Co.* v. *Tax Commission*, 302 U.S. 186 (see J.S. App. 28). The short answer is simply that, for the reasons shown above, the reasoning is not carried "to its logical conclusion." Taxes such as those in *King & Boozer*, *Dravo Contracting*, *Mason Co.*, as well as in *United States* v. *Boyd*, 378 U.S. 39, are valid, even when imposed on those who deal with the federal government, because they are not discriminatory under the standard established in *McCulloch* and *County of Fresno*. They are imposed equally on all similarly situated (private as well as governmental) contractors in the state. The tax involved here is not.

II.

THE DECISION OF THE MONTANA SUPREME COURT IN *KIEWIT #1* DOES NOT BAR THE UNITED STATES FROM CHALLENGING THE CONSTITUTIONALITY OF THE TAX IN THIS CASE

The district court also correctly held that the United States is not barred by the decision of the

Montana Supreme Court in *Kiewit #1* from challenging the constitutionality of the tax in this case.

Appellants advance two separate arguments in support of a bar against reaching the merits. First, they contend (Br. 42-45) that the district court had no jurisdiction under the rule of *England* v. *Medical Examiners*, 375 U.S. 411. Second, they invoke (Br. 46-49) the doctrine of collateral estoppel as a bar to the federal government's claim. We submit that neither *England* nor collateral estoppel is applicable here.

A. In *England*, the plaintiff brought an action in the federal district court challenging the constitutionality of a state statute. The district court invoked, *sua sponte*, the doctrine of abstention on the ground that a state court might rule that the plaintiffs were not governed by the statute and thereby avoid a constitutional determination. The district court therefore stayed further proceedings until the state courts could consider the state law. The plaintiffs thereupon brought suit in the state court but did not restrict those proceedings to the state law question. To the contrary, "[t]hey unreservedly submitted for decision, and briefed and argued, their contention that the Act, if applicable to [them], violated the Fourteenth Amendment" (footnote omitted) (375 U.S. at 413). After the state courts ruled against them, the plaintiffs returned to the district court which dismissed their action because the state courts passed on all issues raised.

This Court held "that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court" (*id.* at 419). In so holding, the Court observed that a party is not required to litigate his federal claims in the state courts. However, if the federal court abstains, either party may inform the state courts that he intends, should the state courts hold against him on the question of state law, to return to the district court for disposition of his federal contentions (*id.* at 421). An explicit reservation is not required. As the Court explained, "the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than [inform the state courts of his federal claims] and fully litigated his federal claims in the state courts" (*ibid.*).

England therefore stands for the proposition that parties who initially present their federal claims to a federal court cannot litigate those issues in that court where (1) the federal court abstains and sends the parties to state court for a resolution of state law grounds, (2) those parties "freely and without reservation" litigate all their claims in the state courts, (3) the parties in the federal and state court actions are identical, and (4) the state court has competent jurisdiction over the parties. These conditions are not met in the instant case.

First, the district court never invoked the doctrine of abstention. The parties to this litigation merely

agreed to continue the case while the state courts considered *Kiewit #1*, in which the federal government appeared as *amicus curiae*. In response, appellants argue (Br. 43-44) that whether the order is characterized as a continuance or abstention is of no moment because it was the intent of the parties to have the *Kiewit #1* litigation resolve the constitutionality of the Montana tax. But neither the stipulation (J.S. App. 49-50) nor the order of continuance (J.S. App. 50-51) supports appellants' view of the matter. To the contrary, these documents simply recite that the federal court case is to be continued "pending the resolution in the state courts of Montana" (J.S. App. 49, 50) of *Kiewit #1*. Thus, this case is not comparable to the traditional abstention situations where the parties to a federal action repair to the state court for an adjudication of state law in the same case that may obviate the need for a resolution of the federal claims, or where there are difficult questions of state law best resolved by a state court. Here, the parties simply agreed to suspend proceedings pending the outcome of a previously pending separate state court litigation brought by another party, *viz.*, Kiewit Sons' Company.[12] That case did not involve resolution of any state law ques-

[12] That the parties intended the federal district court to consider independently the merits of the case is further demonstrated by the provisions in the stipulation and order relating to disbursement of the fund and interest accruing from the taxes depending upon which party prevailed "in the above entitled action" (J.S. App. 50, 51).

tions that might avoid consideration of the federal constitutional immunity claims present here.

The result in *Kiewit #1* therefore represents nothing more than a related precedent to be taken into account; it does not control this case, much less bar the United States from having its day in the federal district court. Since abstention is not applicable, this case falls within the general rule that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction * * *." *McClellan* v. *Carland*, 217 U.S. 268, 282. The postponement of proceedings in this case by mutual consent of the parties does not rob the district court of jurisdiction. As the Court stated in *England* v. *Medical Examiners*, *supra*, 375 U.S. at 415, "[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims" (footnote omitted). Accord, *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-189.

Second, in agreeing to the continuance, the United States never "freely and without reservation" submitted its claims to the state court. Appellants allege that (Br. 44-45) the cooperation between the federal government and the plaintiff-contractor in *Kiewit #1* and the similarity of the complaints in both cases is evidence that the United States freely submitted

its claims to the courts of Montana. But the rule of *England* becomes applicable only when "a *party* freely and without reservation submits his federal claims for decision by the state courts * * *" (emphasis supplied) (375 U.S. at 419). The Court's reference to a "party" is not accidental for the bar of the *England* rule arises only upon the issuance of a valid state court judgment that binds the party seeking to invoke the jurisdiction of the federal district court. Here, the state courts in *Kiewit #1* never acquired jurisdiction over the federal government which appeared as *amicus*; the United States is therefore not bound by the judgment in that case. Indeed, in this action, the federal government seeks a determination of the constitutionality of the Montana tax with respect to all of its contracts. *Kiewit #1*, however, involved only one type of contract that is no longer employed. See p. 7, n. 7, *supra*. Thus, the judgment of the federal district court below does not undermine the "regard for the respective competence of the state and federal court systems" that lies at the heart of the abstention doctrine. *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U.S. 25, 29. The rule in *England* therefore did not prevent the district court from reaching the merits of this case.[13]

[13] Cf. *Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800. There, although the case fell within none of the abstention categories, the Court upheld the dismissal of a federal suit where there was a concurrent state court proceeding. However, the decision turned on the particular policy against piecemeal litigation of water rights evidenced by the consent to state court jurisdiction over the United States provided by the McCarran amendment, 43 U.S.C. 666 (424 U.S. at 819-821). Those considerations do not apply here where the United States was not a party to the state proceeding and where constitutional issues are presented.

B. Nor does the doctrine of collateral estoppel bar the United States from litigating the merits of its claim. The usual statement of the rule is that where an issue of fact, or in limited situations an issue of law "essential to the judgment, is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties * * *." A.L.I., *Restatement of Judgments* § 68(1) (1942). The doctrine "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599-600. See also 1B Moore's *Federal Practice*, pars. 0.443, 0.448 (2d ed. 1974).

Here, the controlling facts changed between *Kiewit #1* and the instant case. As we have pointed out (*supra*, pp. 7-8), the contract at issue in *Kiewit #1* forbade the contractor from claiming the credit and refund provisions of the gross receipts tax. This provision is no longer applicable in the contracts involved in this litigation.

The decision in *Kiewit #1*, moreover, did not determine the issue here. Because of the amount of heavy equipment that Kiewit employed in Montana, it was not established that the gross receipts tax here

in question would have imposed any financial burden upon the contractor. Had it claimed the credit, it appeared that Kiewit's personal property tax would have eliminated all of the public contractor's gross receipts tax. Indeed, the Montana Supreme Court proceeded upon the assumption that there might in all cases be "a total washout of the 1% gross receipts payments" (J.S. App. 109, 111-113). Though Kiewit might have been relieved of all of the public contractor's tax had it claimed the available credit, and though the Supreme Court of Montana was uncertain of the ultimate fiscal impact of the tax, the record in this case establishes that with respect to its contractors, the effective rate of the tax borne ultimately by the United States, after taking all credits available, will be approximately one-half of one percent of gross receipts (J.S. App. 11, 87-88). Thus, the factual assumption upon which *Kiewit #1* rests is lacking in this case.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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of the United States

OCTOBER TERM, 1978

No. 77-1134

UNITED STATES OF AMERICA,

Appellee,

vs.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W. A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

On Appeal From the United States District Court for the District of Montana

Brief of the States and Territories of Virginia, Arizona, North Dakota, Alaska, Nebraska, Maryland, Hawaii, Nevada, Oregon, Alabama, Wyoming, Guam, Washington, Arkansas, Florida, West Virginia, Iowa, Idaho, New Mexico, Indiana, Puerto Rico, Colorado, and Michigan as Amici Curiae in Support of Appellant.

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I.
INTRODUCTORY STATEMENT

This brief is submitted by the signatory states as Amici Curiae in support of the Brief of the Appellants in the

above captioned case. This brief being sponsored and filed by the aforementioned states; consent to its filing is not required. United States Supreme Court Rule 42(4).

II.

OPINIONS BELOW

The opinion of the 3-judge District Court for the District of Montana, Helena Division, is reported at 437 F. Supp. 354 (1977). Copies of that opinion, and the unreported opinion entered by said court on November 18, 1974, are appended to Appellants' Jurisdictional Statement as Appendix pp. 5-35, and pp. 65-75.

III.

INTEREST OF AMICI CURIAE

The interests of the states joined as Amici in this brief, revolve around what is believed to be the far reaching effects of this opinion as it relates to the question of state taxation of independent contractors performing work for the United States of America, (federal government).

The finding of the District Court majority, viz., that a constitutional infirmity exists in a tax levied upon independent contractors performing work for the federal government, because said tax generates income for the taxing state, clearly has serious consequences for states other than Montana. As the argument contained herein will demonstrate, such a position is not consistent with the previous decisions of this Court.

It is essential that this Court at this time reaffirm constitutional standards previously established, so as to allow the legitimate and continued state taxation of independent contractors performing work for the federal government.

IV.

ARGUMENT

Several issues are raised in Appellants' Brief which contain merit. However, of the issues raised, one is of singular importance not only to the State of Montana, but contains national implications of great importance to the Amici states as well. Therefore, this brief is limited solely to a discussion of that question.

THE ACT DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The amici have previously in this matter filed a brief in support of Appellant's Jurisdictional Statement. At that time we urged this court to accept jurisdiction of this cause because of the importance of the issue raised in this matter. Without merely restating our previous position in this matter we file this brief to urge this court to again uphold the individual sovereign states right to tax independent contractors performing work within their exterior boundaries.

The tax in question is known as the Montana Contractors' Gross Receipts Tax, and is found in Chapter 35, Title 84, Revised Codes of Montana (1947). Basically, the tax is a levy of one percent of the gross receipts earned by public contractors within the State of Montana. The tax is levied on the contractor and not on the public agency. A public contractor is defined as any person performing a contract for the State of Montana or any other public body, including the federal government. The Act provides for a system of refunds and credits, whereby a contractor can receive a cash refund for personal property taxes, or a credit for any corporate income taxes. The tax is levied on all public contractors and makes no distinction, as to the state of incorporation or principal place of business. During the years of the operation of the tax, it has resulted

in revenue being generated for the State of Montana equal to one-half of the amount of the tax collected — i.e. effective tax of ½ percent.[1]

As has been noted previously, the finding of the District Court which causes concern for the Amici is the fact that the Act is rendered unconstitutional under the Supremacy Clause because it generated revenue for the State of Montana.

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G. R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G. R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G. R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G. R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G. R. Tax and gets no return of the over plus of approximately 50 percent." (J.S. App., page 13.)

The reasoning of the District Court is premised on the fact that because the tax levied on contractors performing public work generated tax revenue for the state and not the federal government, Montana was therefore not complying with the rule as established in *Phillips Chemical Co. vs. Dumas Independent School District*, 361 U.S.

[1]The Act has been questioned in the Supreme Court of the State of Montana on two different occasions by the federal government, acting through its contractor Peter Kiewit & Sons, Inc. For a discussion of the history of the Act and the legislative intent, *see Peter Kiewit & Sons Co. vs. State Board of Equalization*, 161 Mont. 140, 505 P.2d 102 (1973) and *Peter Kiewit & Sons Co. vs. Dept. of Revenue*, 166 Mont. 260, 531 P.2d 1327 (1975).

376 (1960). See also *Homestake-Sapin Partners vs. United States*, 375 F.2d 507 (10th Cir. 1967). It is the position of the Amici that the District Court has misread and misapplied the *Phillips Chemical* rule and tested for equality of economic impact at the level of the sovereigns rather than at the level of those who deal with the sovereigns i.e. the contractors. Such a position is directly contrary to the previously established law of this very court.

Beginning with the case of *James vs. Dravo Contracting Co.*, 302 U.S. 134 (1937), this Court upheld as being constitutional a "2%" tax imposed by a state upon the gross receipts of a contractor earned under contracts with the federal government. *See also, Silas Mason Co. vs. Tax Commission of Washington*, 302 U.S. 186 (1937), upholding the validity of an occupation tax applied to gross income received by individuals performing work for the federal government; *United States vs. Boyd*, 378 U.S. 39 (1964), upholding a tax levied by the State of Tennessee on property owned by the federal government, but used by independent contractors in the performance of federal contracts; *Alabama vs. King and Boozer*, 314 U.S. 1 (1941), upholding the validity of a sales tax levied upon contractors operating under a "cost plus a fixed fee" contract with the federal government;[2] *United States vs. City of Detroit*, 355 U.S. 466 (1958), upholding the validity of a state tax levied on the lessee of property owned by the federal government. As stated in *United States vs. City of Detroit, supra*, at 469:

> "At the same time it is well settled that the Government's constitutional immunity does not shield pri-

[2]See also *U.S.A. and Hercules Inc. v. Forst*, 569 F.2d 811 (4th Cir. 1978).

vate parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the government."

The cases make it clear that in order for a tax to be valid, it must (i) not have substantial economic impact on the federal government, (ii) not be levied directly on the federal government; and (iii) not be discriminatory. A review of the tax levied by the State of Montana herein indicates that it falls within these guidelines. It is a tax ¼ as large as the tax levied in the *Dravo* case, *supra* (½ of 1% as opposed to 2%); it is not direct as it is levied on the independent contractors and not on the federal government; and finally, it is not discriminatory as it is levied upon all contractors performing work for any public body, including the State of Montana and all counties, cities and special improvement districts, etc.

Amici would again cite to the court the very recent opinion of *United States vs. County of Fresno*, 429 U.S. 452 (1977) as supporting the position of Appellant and Amici.

> "The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the federal government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the states." 429 U.S. at 462.

Here, the tax is levied on all similarly situated constituents, all contractors doing work for any public agency. All similarly situated constituents are taxed, as required by this court. Montana has treated all contractors dealing with public bodies in the same way, levying a tax on their gross receipts. A contractor performing work for the State of Montana (or any of its

inferior governments), as opposed to a contractor performing work for the federal government, has been given no advantage. Rather, the "discrimination" that the majority opinion speaks of relates to the fact that the tax generated reduces the cost the state government ultimately has to pay. The test set forth in the *Fresno* case, *supra*, or the *Phillips Chemical* case, *supra*, does not, as the lower Court found, make invalid a state tax levied on contractors performing work for the federal government merely because the monies end up in the coffers of the state treasury. Rather, they require that if a tax is to be levied on a federal contractor, a like and equal tax must be levied on a state contractor, as the Act provides.

The imposition of taxes under statutes such as the Act in question here, have been upheld by this Court and with Congressional approval. It is for Congress to act if and when such taxes by any of the various states become unduly burdensome or restrict governmental function:

> "If they unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its proper powers, not this Court, to make the desirable adjustment."
>
> *United States vs. Boyd*, 378 U.S. 39, 51 (1964). See also *United States v. State ex rel. Beko*, 88 Nev. 76, 493 P.2d 1324 (1972).

Additionally, the reasoning of the majority opinion, if adopted by this Court, would have a very serious and far reaching effect on the vital issue of inter-sovereign taxation. As Judge Kilkenney in his dissent pointed out, (J.S. App. 28-29), and as the Amici readily agree, if the

reasoning of the majority is allowed to stand, this opinion overrules previous decisions of this Court. Although the government presently states that this opinion, if adopted, does not overrule this Court's previous decisions (M.A. pp. 9-10), it remains a vital concern to the Amici that this Court again reestablish the principal of allowing the states to properly exercise their rights within their own sphere of taxation. The states are not attempting to lay a tax directly on the United States or one of its agencies, but are taxing only those independent instrumentalities operating within their boundaries. As pointed out by this Court in *M'Culloch vs. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the right of taxation resides within and is an inheritent power of the state. An affirmance of the decision of the majority herein would be to revert to the law as exemplified in the case of *Panhandle Oil Co. vs. State of Mississippi*, 277 U.S. 218 (1928). It is important that this Court again re-establish this principal continuously under attack by the Government and allow the sovereign individual states to levy nondiscriminatory taxes upon independent contractors performing work within their boundaries.

CONCLUSION

This issue is of tremendous concern to the Amici and truly represents a question having nationwide impact in the field of inter-sovereign taxation. Therefore, we respectfully urge this Court to reverse the decision of the majority and hold as constitutional the Montana Contractors Gross Receipts Tax Act.

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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1134

STATE OF MONTANA, ET AL.,

Appellants,

— against —

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF ON BEHALF OF THE STATE OF NEW YORK AS AMICUS CURIAE OF APPELLANTS

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Interest of the Amicus Curiae

The United States of America by seeking declaratory and injunctive relief against the enforcement of Montana's gross receipts tax, Chapter 35, Title 84, Revised Codes of Montana, 1947, as amended in 1967, challenges long standing interpretations of the law upholding the constitutionality of statutes under which New York State and other states have collected taxes from contractors who deal with the federal government. The opinion of the Court below (the three-judge United States District Court for the District of Montana, Helena Division) is

an incursion on the taxing power of States as this Court, in its previous decisions has announced and interpreted that power. This brief is filed in support of the constitutionality of Montana's gross receipts tax in accordance with Rule 42 of the Court.

Opinion Below

The opinion of the three-judge district court for the District of Montana, Helena Division, is reported at 437 F. Supp. 355 (1977). The opinion of the three-judge district court held Montana's gross receipts tax to be in violation of the supremacy clause of the United States Constitution. Judge EAST, writing for the majority said (p. 359):

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G. R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G.R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G.R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G.R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G.R. Tax and gets no return of the overplus of approximately 50 percent."

Constitutional Provisions and Statute Involved

United States Constitution, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Montana's public contractors' gross receipts tax, Chapter 35, Title 84 of the Revised Codes of Montana, 1947, as amended, is lengthy and is set forth in full in Appellants' Jurisdictional Statement at page 38, *et seq.* It is summarized as follows:

> The tax is a levy of one percent of the gross receipts earned by public contractors within the State of Montana. The tax is levied on the contractor and not on the public agency. A public contractor is defined as any person performing a contract for the State of Montana or any other public body, including the federal government. The act provides for a system of refunds and credits, whereby a contractor can receive a cash refund for personal property taxes, or a credit for any corporate income taxes. The tax is levied on all public contractors and makes no distinction, as to the state of incorporation or principal place of business. During the years of the operation of the tax, it has resulted in revenue being generated for the State of Montana, equal to one-half of the amount of the tax collected--*i.e.* effective tax of 1/2 percent.

Question Presented

While several issues are raised in the appellants' brief, this brief is limited solely to the question of whether or not Chapter 35, Title 84 of the Revised Codes of Montana, 1974, as amended in 1967, as applied to contractors dealing with the Federal government violates the supremacy clause in Article VI, Clause 2 of the United States Constitution.

Statement

The United States brought this action in the United States District Court for the District of Montana in April, 1971 against the State of Montana, its Department of Revenue and its Director of Revenue. It sought, *inter alia*, (1) a declaratory judgment that the imposition of the gross receipts tax upon the United States, its contractors, subcontractors or those with whom it dealt violated the Supremacy Clause of the United States Constitution, (2) a permanent injunction against

imposing the tax on those persons, and (3) a refund of the taxes collected from those persons (Appellants' Appendix, pp. 9-17).

Prior to 1971, the Federal government contractually required its contractors within the State of Montana not to take advantage of the refund provisions and credits provided for in Montana's public contractors gross receipts tax. However, since 1971, the Federal government's contracts, as those involved here, required the contractors to take advantage of all refunds and credits provided for in the gross receipts tax and to reimburse the Federal government in the amount of them. The Court below granted the relief requested by the Federal government. The majority of the Court held that because revenues from the gross receipts tax went to the State of Montana and not to the Federal government, Montana was treating itself better than the Federal government.

ARGUMENT

MONTANA'S PUBLIC CONTRACTORS' GROSS RECEIPTS TAX DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

In the exercise of its power to tax a State is free to select the subjects of taxation and to grant exemptions. No recent rule of equality of taxation is imposed by either due process or equal protection. Inequalities which result from a single use of one particular class for taxation or exemption infringe no constitutional limitation. State Legislatures are not bound to tax every member of a class or none. They may make distinctions of degree which have a rational basis. The distinctions are presumed to rest on a proper basis if there are any conceivable state of facts which could support them. Legislatures are not required to list a complete catalogue of the considerations which move its members to enact tax laws. In the absence of such a record courts cannot assume that a legislative action is capricious or that with its knowledge of local

conditions which the legislation is to be applied a Legislature was not aware of facts which afford a reasonable basis for action. Administrative convenience and the collection or measurement of a tax alone affords a sufficient justification of a different treatment of taxpayers. Where a public interest is served one business may be taxed and another untaxed. These principles have been long established (*Carmichael* v. *Southern Coal Company*, 301 U.S. 495 [1936]).

Montana's public contractors licensing gross receipts tax, Chapter 35, Title 84, Revised Codes of Montana, 1947, as amended by the Montana Legislature in 1967, was a revenue enforcing measure which was enacted in an attempt to require some of the contractors working in the State of Montana to meet their tax responsibilities. The Montana Legislature enacted the statute to work out a solution to the problem of contractors in paying their taxes. The Supreme Court of Montana labeled the act as a legislative "revenue enforcing measure designed to operate hand in hand with [the State's] long-standing personal property tax and income tax, to ensure more effective tax collection and reduce tax avoidance." (*Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 [1973].) It does not appear from the decisions below that Montana had as an important tax collection problem with private contractors *vis-a-vis*, public contractors. This fact would seem to justify the imposition of a public contractors' gross receipts tax.

The statute by its terms makes no distinction between contractors dealing with the Federal government and those dealing with the State of Montana and municipal corporations within the State. Any discrimination against the Federal government prior to 1971 was caused by the Federal government inserting a clause in some of its Federal contracts which prohibits a contractor from taking advantage of the refunds and credits available to them under the statute. In 1971 the Federal government no longer required the insertion of such a

clause in its contracts but required contractors to take advantage of all refunds and credits provided for in Montana's gross receipts tax and to reimburse the Federal government for them. It does not appear that the Federal Government was required to prevent its contractors from taking advantage of the credits available to them under the gross receipts tax of any kind. The injury resulting to the fisc of the United States was self-inflicting and resulted from the actions of the voluntary actions of its own agencies and employees and inserting the clause in some of the construction contracts.

The gross receipts tax is not a tax imposed upon the Federal government or any of its agencies. The tax is imposed only on contractors who deal with the State of Montana, its county or municipal governments and school districts and the Federal government. The question of whether the statute was imposed on contractors or upon the State of Montana, its subdivisions or the Federal government is a question of State law on which the Supreme Court of Montana can and did speak with final authority. The Supreme Court of Montana has held that the tax is imposed upon the contractor. (See, *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 [1973].) The fact that the Federal government ultimately paid the tax in this case, as part of its construction costs, does not cause the tax to fall within constitutional prohibitions against its imposition. This Court stated recently in *United States* v. *County of Fresno*, 1977, 429 U.S. 452 at p. 462:

> "The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State."

See also, *United States* v. *Boyd*, 378 U.S. 39, 1964, *Alabama* v. *King and Boozer*, 314 U.S. 1, 1941; *James Dravo Contracting*, 302 U.S. 134, 1937. A contrary rule would invalidate various excise taxes imposed by the Tax Law of the State of

New York as well as other states such as sales and motor fuel taxes which are collected from contractors who work on projects for the Federal government.

CONCLUSION

THE JUDGMENT OF THE THREE-JUDGE DISTRICT COURT FOR THE DISTRICT OF MONTANA SHOULD BE REVERSED AND A JUDGMENT UPHOLDING THE CONSTITUTIONALITY OF THE MONTANA REVISED GROSS RECEIPTS TAX ENTERED.

Dated:

Respectfully submitted,

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Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF POSITION OF THE STATE OF MONTANA

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I.

INTEREST OF AMICUS CURIAE

This brief is submitted by the State of Washington and is sponsored by the Attorney General of the state; as such, consent to its filing is not required under Rule 42(4) of the United States Supreme Court Rules.

The interest of the State of Washington in the

case at bar may be stated succinctly: if the rationale and decision of the majority of the three-judge district court below are sustained by this Court, Washington together with virtually all other states will be seriously impeded in their efforts to require private profit-making construction companies doing business with the federal government to contribute their fair share of those state taxes necessary for the support of state services, including state services rendered to those companies. More specifically, the State of Washington is itself embroiled before the Ninth Circuit Court of Appeals in litigation with the United States involving state tax statutes somewhat similar to those of Montana challenged here.[1] As such, the decision of this Court in Montana's case may have a very great impact upon Washington's ability to defend its taxes in the federal appellate courts.

There is one additional reason why Washington is particularly concerned about the issues raised in the case at bar. The Montana tax under challenge is a gross receipts tax upon contractors performing construction contracts in Montana for the federal government, state government, or county or municipal governments or school districts in Montana.[2] Yet, Montana's public contractor's gross receipts tax is part of a larger Montana tax structure which includes, among other taxes, a net income tax. By contrast, the State of Washington has no net income tax

[1]*United States of America v. State of Washington, et al., appeal docketed*, No. 78-1424, 9th Cir., February 24, 1978.

[2]R.C.M. 1947 §84-3501(b).

but rather relies chiefly with respect to taxation of economic activities, including performance of construction contracts for the United States, upon a business and occupation tax (a gross receipts tax)[3] and various sales and use taxes.[4]

As such, it is obvious that the decision of this Court in the case at bar concerning Montana's gross receipts tax could have a very major impact in Washington which is not able to rely for part of its revenues upon income taxes.

II.

ARGUMENT

A. Introduction

It is not the intention of the State of Washington in submitting this amicus curiae brief simply to repeat the arguments of appellant State of Montana. Moreover, it is not Washington's intention to address the detailed operation of the Montana statute, leaving that argumentative function to the parties to the litigation.

Rather, this amicus curiae brief has two limited objectives. First, it will focus upon the nature of the interest which Washington believes is protected by the Supremacy Clause of the United States Constitution[5] as related to contentions by the United States that taxes such as Montana's gross receipts tax "discriminate" against the United States or those with

[3]Chapter 82.04 Revised Code of Washington.

[4]Chapters 82.08 and 82.12 Revised Code of Washington.

[5]U.S. Const., Art. VI §1, cl. 2.

whom it deals in contravention of that Clause. More specifically, Washington will argue that proper analysis of the discrimination question shows that the approach taken by the United States in the court below as well as the approach reflected in the majority decision being reviewed by this court are fundamentally unsound.

Second, and more briefly, Washington will argue that the analysis utilized by the majority district court opinion below is fundamentally inconsistent with a 1937 decision of this Court involving the State of Washington.[6]

B. **Montana's Challenged Tax Does Not Abridge Any Interest Protected by the Supremacy Clause.**

In the case at bar, the United States has contended—and a majority of the three judge district court has ruled—that imposition of the Montana gross receipts tax upon public contractors for the federal government is discriminatory for essentially two reasons: (1) when the tax is paid by contractors for the state, the state in its taxing capacity retains that tax as general revenue while similar contracts for the federal government do not engender revenues to the federal government;[7] and (2) the Montana tax is discriminatory because the gross receipts tax discriminates against the federal government in favor of private contractors in the state.[8]

[6]*Silas Mason Co. v. Tax Commission of Washington*, 320 U.S. 186 (1937).

[7]Lower court majority decision, Appendix, p. 13.

[8]Lower court majority decision, Appendix, p. 17.

Washington submits that the majority decision below is in error on both grounds of perceived discrimination. As to the first type of discrimination found to exist by the majority decision below, Washington will argue in Part II(C), *infra*, that this contention and ruling are flatly inconsistent with at least two decisions of this court, namely, *Silas Mason Co. v. Tax Commission of Washington*, 320 U.S. 186 (1937) and *James v. Dravo Contracting*, 320 U.S. 134 (1937).

More generally, Washington submits that the fundamental difficulty with the decision of the majority below and with the contentions of the United States is that neither the United States nor the court below have determined precisely what constitutes "discrimination" in the context of the interests protected or furthered by the Supremacy Clause of the United States Constitution.

It is certainly correct that

> "* * * a [state] tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals." *United States v. City of Detroit*, 355 U.S. 466, 473 (1958).

See also, *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 387 (1960).

The problem with the decision below is that it proceeds from this "boilerplate" articulation of the general rule against discrimination to a conclusion that discrimination is present with respect to the

Montana statute without any clear analysis of the nature of the concept of "discrimination" which properly should be utilized in cases such as the present one.

At the outset, it is readily apparent that the mere "singling out" of the United States or those with whom it deals by a state tax statute is insufficient in itself to establish a violation of the Supremacy Clause. Surely no one would contend that if a state tax structure imposed a gross receipts tax on all construction activity *except* construction activity performed for the United States that this circumstance would mean that the United States and its contractors were by virtue of this circumstance "singled out" for disparate treatment in violation of the Supremacy Clause. Thus, as this rather extreme example illustrates, mere disparate treatment alone is insufficient to establish the presence of discrimination prohibited by the Supremacy Clause. Put otherwise, for a state tax (whose legal incidence is not upon the United States) to run afoul of the Supremacy Clause, disparate treatment *plus* some additional factor must be established .

Fortunately, this Court has recently provided additional analytical tools for determining what the proper judicial inquiry should be in cases such as the present one and in so doing, the Supreme Court has clarified the nature of the interest which the Supremacy Clause is designed to protect. *United States v. County of Fresno*, 429 U.S. 452 (1977).

The fundamental flaw with the argument of the

United States below and the decision of a majority of the district court is that the argument and decision attempt to proceed from the fact that not all construction contractors are subject to Montana's gross receipts tax to the conclusion that this tax therefore discriminates against federal construction contractors in violation of the Supremacy Clause. Significantly, nowhere in the gap between the fact that not all construction contractors are subject to the tax and the conclusion that the tax therefore violates the Supremacy Clause does there appear any analysis of whether this admittedly disparate treatment with respect to construction contractors gives rise to the type of discriminatory situation against which the Supremacy Clause was meant to guard. The most recent decision on this question in *Fresno*, *supra*, makes manifest that any conclusion, in the absence of this intervening analysis, is without a proper foundation.

In *Fresno*, employees of the United States Forest Service were furnished housing on federal property as partial compensation for services rendered the Forest Service. Because of the fact that the housing these employees "rented" was on tax-exempt property, the employees, under California law, were determined to hold taxable possessory interests in the property and, therefore, were assessed an annual possessory interest tax on their possessory interests in this housing. Such a tax was only imposed upon renters of housing on tax-exempt property. This tax

did not apply to renters of housing on taxable real property. Clearly, then, disparate treatment existed, with certain individuals being taxed because they rented from the federal government while other similarly situated individuals, who did not rent from the federal government, were not taxed. And yet, the Court in *Fresno* wrote:

> "Although the tax is imposed by the appellee counties on renters of real property only if the owner is exempt from taxation—and consequently is not imposed on the vast majority of renters of real property in California—the tax is not for that reason discriminatory." 429 U.S. 452 at 464.

Similarly, the Supreme Court in *United States v. Detroit*, 355 U.S. 466 (1958), recognized that the mere existence of disparate tax treatment, as between those who deal with the federal government and others similarly situated who do not, does not in and of itself compel the conclusion that there exists the type of discriminatory treatment of the federal government which the Supremacy Clause was intended to prevent. Under the Michigan law considered in *City of Detroit*, the user of tax-exempt real property, in a business conducted for profit, was to be subject to taxation to the same extent as if he or she owned the property. Again, the Court acknowledged that while this taxation scheme *did* create disparate treatment and *did* subject those who dealt with the federal government to a tax not imposed upon all individuals who used real property in a business conducted

for profit, still this scheme of taxation did not create the type of discriminatory situation to which the Supremacy Clause was addressed. Referring to the class of individuals singled out for this tax, the Supreme Court said:

> "But here the tax applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities. The class defined is not an arbitrary or invidiously discriminatory one." 355 U.S. 466 at 473.

Thus, *Fresno* and *City of Detroit* stand for the proposition that the mere fact of dissimilar state tax treatment, as between an individual who deals with the federal government and an individual who has the same dealings with an entity other than the federal government, does not *of itself* render the state tax invalid.

Washington submits that the import of these decisions is to require a further and more precise analysis of Montana's disparate treatment of federal versus state or federal versus private contractors to determine whether this treatment creates or has the potential to create the type of discriminatory situation which the Supremacy Clause of the Federal Constitution is intended to prevent.

The most recent and thorough discussion of the particular evil with respect to state taxation which

the Supremacy Clause was intended to prevent, occurs in *Fresno*.

As one commentator has observed, the result in *Fresno* could well have been reached by the Supreme Court simply by a per curiam opinion affirming the California court and citing, *inter alia*, *City of Detroit*, *supra*. Yet,

> "The Court in *County of Fresno* did affirm, but not simply on the authority of those precedents. Instead, it returned to the source, *M'Culloch v. Maryland*, [17 U.S. (4 Wheat.) 316 (1819)] in an apparent effort to rationalize the analytical framework for determining the scope of the constitutional immunity of federal instrumentalities from state taxation." W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?* 75 Mich.L.Rev. 1426, 1436-37 (1977)[9]

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) involved the imposition of a tax by the state of Maryland on notes issued by the Bank of the United States located in Maryland. No other Maryland bank was subject to this tax. While *M'Culloch* invalidated this Maryland tax, in *Fresno*, the Court summarized the reasoning of the *M'Culloch* Court as follows:

> "The Court noted that the power to tax the bank 'by the States may be exercised so as to destroy

[9]This thoughtful article analyzes common doctrinal themes running through recent Supreme Court decisions under the Import-Export Clause (U. S. Const. Art. I, §10), the Commerce Clause (U. S. Const. Art. I, §8, cl. 3), and the Supremacy Clause. The article was very recently cited generally and approvingly by the Supreme Court in an opinion concerning only the Import-Export and Commerce Clauses; *Dept. of Revenue of Washington v. Assoc. of Washington Stevedoring Cos.*, 46 U.S.L.W. 4363, 4370, fn. 27 (U.S. April 26, 1978).

> it,' 4 Wheat, at 427; and consequently that the power to tax, if admitted, could be exercised so as effectively to repeal the Act of Congress which created the bank. If the State's power to tax the bank were recognized in principle, the Court doubted the ability of federal courts to review each exercise of such power to determine whether the tax would or would not destroy a federal function. Finally, the Court rejected the State's argument that the power to tax involves the power to destroy only where the taxing power is abused, and that the Court should simply trust the States not to abuse their power to tax a federal function just as it must trust a State not to abuse its power to tax its own citizens. The Court rejected the argument because the political check against abuse of power to tax a State's constituents is absent when the State taxes only a federal function. A State's constituents can be relied on to vote out of office any legislature that imposes an abusively high tax on them. They cannot be relied upon to be similarly motivated when the tax is instead solely on a federal function." (Footnotes omitted.) 429 U.S. 452 at 458-59.

In upholding the California tax, the Court in *Fresno* formulated a rule for determining when a state tax discriminates against those who deal with the federal government in contravention of the Supremacy Clause, and explained how this rule was based on the *M'Culloch* decision:

> "The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State. This

> rule returns to the original intent of M'Culloch v. Maryland. The political check against abuse of the taxing power found lacking in M'Culloch, where the tax was imposed solely on the Bank of the United States, is present where the State imposes a nondiscriminatory tax only on its constituents or their artificially owned entities; * * * *" (Footnotes omitted.) 429 U.S. 452 at 462-63.

That the existence of such a political check precludes the existence of the type of discriminatory taxation intended to be prevented by the Supremacy Clause is further evidenced in *Fresno:*

> "A tax on the income of federal employees, or a tax on the possessory interest of federal employees in Government houses, if imposed only on them, could be escalated by a State so as to destroy the federal function performed by them either by making the Federal Government unable to hire anyone or by causing the Federal Government to pay prohibitively high salaries. This danger would never arise, however, if the tax is also imposed on the income and property interests of all others residents and voters of the State." 429 U.S. 452 at 463, fn. 11.

We submit that what this Court is saying in *Fresno* is that a state tax, even though not imposed directly upon the federal government, may still bring about the evil which the Supremacy Clause is intended to prevent, i.e., the destruction of a federal function, if a state is free to tax those who deal with the federal government without concern for offending that state's other citizens. Thus, when this Court speaks of discriminatory taxation of those who deal with the federal government, it is this situation, in

which the state may achieve indirectly what it is prohibited from achieving directly, of which the Court speaks.

The appropriate antidote to this evil, upon which this Court has fastened, is the subjection of a suitable portion of the state's citizens to the same taxes as those imposed upon individuals and companies dealing with the federal government. With the presence of this factor, the unfettered ability of the state to attempt in an indirect fashion what it cannot attempt directly withers, and there no longer exists, for purposes of the Supremacy Clause, a discriminatory situation with regard to state taxation of those who deal with the federal government.

In the present case, then, in order to determine whether the Montana gross receipts tax on governmental construction contractors gives rise to the circumstances in which the type of discrimination prohibited by the Supremacy Clause may arise, this Court should inquire as to whether the taxes imposed are unique to federal construction contractors or are imposed upon a sufficiently broad base of the state's citizens so as to provide an effective *political check* against any abuse of the state's tax power. In the words of this Court in *Fresno*, the inquiry which must be made to determine if impermissible discrimination exists is to ask whether "* * * the tax is imposed equally on other similarly situated constituents of the State" 429 U.S. 452 at 462.

Montana's challenged gross receipts tax is not

imposed upon federal construction contractors because they are construction contractors, but rather because under Montana law, they are "public contractors". In turn, all public contractors including contractors for the United States, the State of Montana, and Montana county or municipal governments or school districts are subject to this tax.[10] Similarly, in *Fresno* the challenged taxes were not imposed because the subject taxpayers were working for the United States Forest Service, but because they were renters of tax-exempt real property and, just as in *Fresno* where the Supreme Court looked at a class of taxpayers defined by the tax itself to determine if all who were similarly situated were treated equally, the Court in this case should look to the class of individuals defined by Montana law as being subject to the challenged taxes to determine if all those situated similarly with federal construction contractors are treated equally under the Montana gross receipts tax.

In the present case, there is no indication that federal construction contractors are treated any differently with respect to Montana's gross receipts tax than any other taxpayer who falls within the larger class of individuals defined as "public contractors" under Montana law.[11] Washington submits that since the class of taxpayers falling within the definition of

[10]R.C.M. 1947 §84-3501(b).

[11]Insofar as the ruling below is premised upon a supposed discrimination based on the ultimate recipient of the state tax revenues, this erroneous conclusion will be addressed in Part II(C) of this Argument, *infra*.

public contractor is and must be significantly larger than just those contractors who contract with the federal government, it seems clear that there exists a more than adequate political check in Montana against any abuse of that state's taxing power. As such, the imposition of Montana's gross receipts tax upon all governmental construction contractors (and not just federal contractors) does not give rise to the type of discriminatory situation prohibited by the Supremacy Clause of the Federal Constitution.

Furthermore, to prohibit the imposition of this tax upon federal construction contractors on the theory that it violates the Supremacy Clause would imbue the Supremacy Clause with an impact which the most recent opinions of this Court have indicated that the Supremacy Clause is not to have. In *Fresno*, this Court noted with respect to the challenged California possessory interest tax:

> "The tax threatens to interfere with federal laws relating to the functions of the Forest Service *only* insofar as it may impose an economic burden on the Forest Service—causing it to reimburse its employees for the taxes legally owed by them or, failing reimbursement, removing an advantage otherwise enjoyed by the Federal Government in the employment market.12
> "12. The Federal Government would otherwise have had the power—enjoyed by no other employer— of giving its employees housing on which no property tax is paid by them either directly or indirectly as rent paid to a landlord who himself paid a property tax." 429 U.S. 452 at 464.

In other words, the bar created by the Supremacy clause to state taxation of those with whom the federal government deals is not intended to provide the federal government with an economically advantageous position from which to deal, relative to other governmental entities. In the present situation, if the Supremacy Clause prohibits the imposition of Montana's gross receipts tax on federal construction contractors, the federal government thereby acquires an advantage enjoyed by no other governmental employer of construction contractors in Montana.

The State of Washington submits that this preferential treatment is not the result which the protections of the Supremacy Clause articulated by this Court in *Fresno* were intended to accomplish or preserve. Moreover, the complete absence in the decision of the majority of the three-judge district court below of any analysis either of the indicia or criteria of "discrimination" within the context of the Supremacy Clause or of the nature of the interest which the Supremacy Clause is designed to protect in situations such as this strongly undermines the validity of any conclusion the court below may have reached as to the presence of perceived discrimination by the Montana gross receipts tax on public contractors against the United States or those with whom it deals.

C. **The Challenged Tax Does Not Discriminate Against the United States Merely Because the United States Does Not Receive Any of the State Tax Revenue.**

As noted earlier, the majority decision below

found that the Montana gross receipts tax discriminates in two ways against the United States or those with whom it deals. In Part II(B) of this Argument, Washington has argued that the nature of the inquiry by the Majority below as to the presence or absence of discrimination as between the United States and private construction project owners was erroneous. In the decision below, the other type of discrimination found to exist by virtue of the Montana tax was premised by the court on the factual circumstance that none of the Montana gross receipts tax revenues are returned to the federal government whereas the State of Montana itself does receive this tax. From this circumstance, incredibly enough, the majority has found prohibited discrimination.

Surely, this conclusion must be wrong. As Circuit Judge Kilkenny observed in his well reasoned dissent:

> "[The majority] erroneously find[s] that the existence of this state revenue works a discrimination against the federal government because there is no corresponding revenue to the federal government. This reasoning, if followed to its logical conclusion, would effectively invalidate the state taxes routinely upheld in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), and *James v. Dravo Contracting*, 302 U.S. 134 (1937)." Dissent, Appendix pp. 27-28.

Washington submits, as the dissent reasons, that the majority below has simply misread the basic test of discrimination set forth in *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960).

It is certainly true that in *Phillips*, this Court stated that:

> "It does not seem too much to require that the State treat those who deal with the Federal Government as well as it treats those with whom it deals itself." *Id.* at 385.

Yet, if this test from *Phillips* is to be given the expansive interpretation suggested by the majority below, no state tax of any kind, whether property or excise, which impacted those who deal with the federal government could ever be valid under the Supremacy Clause for the simple reason that the revenues realized by the state in its taxing capacity are never shared with the United States. Yet, in many cases, this Court has upheld various state taxes which are clearly impacting the United States and those with whom it deals yet which do not involve "reverse revenue sharing" to the United States.

Thus, as the dissent suggests, in both *Alabama v. King & Boozer*, 314 U.S. 1 (1941) and *James v. Dravo Contracting*, 302 U.S. 134 (1937), the interpretation of the *Phillips* rationale utilized by the majority below surely would have invalidated the state taxes in question because there was no provision in the state tax statutes for the revenues realized from imposition of the challenged taxes to be returned to the federal government. Of even more direct concern to the State of Washington, the majority decision below is fundamentally inconsistent with this Court's decision upholding the application of Washington's gross receipts tax to construction contractors for the

federal government; see, *Silas Mason Co. v. Tax Commission of Washington*, 320 U.S. 186 (1937).

More recently, in 1977, this Court in *Fresno*, *supra*, upheld California's possessory interest tax as applied to the leasehold interests of U. S. Forest Service employees, even though there was certainly no provision in the California tax statute for return of the proceeds realized from this tax to the United States.

Thus, Washington submits that the majority decision below fundamentally misapplies the *Phillips* test and does so in such a way that if this Court were to affirm this rationale, no state tax of any type could constitutionally be imposed with respect to those who deal with the federal government.

CONCLUSION

For the reasons set forth in this amicus curiae brief, the State of Washington contends that the decision of the majority of the three-judge district court below is in error in concluding that the Montana gross receipts tax on public contractors operates so as to discriminate against those who deal with the United States in contravention of the Supremacy Clause of the United States Constitution.

Accordingly, the State of Washington urges this Court to reverse the decision of the district court and

to uphold the challenged Montana gross receipts tax.

DATED this 4th day of August, 1978.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GREG MONTGOMERY, one of the attorneys for the State of Washington, as amicus curiae, certify that on the 4th day of August, 1978, I served copies of the foregoing BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE STATE OF MONTANA on appellants and appellees herein by mailing true copies thereof, first class air mail postage prepaid as follows:

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